No. 2293

United States

Circuit Court of Appeals

For the Ninth Circuit.

NORTHERN COMMERICIAL COMPANY and NORTHERN NAVIGATION COMPANY,
Plaintiffs in Error and Appellants.

vs.

UNITED STATES OF AMERICA,
Defendant in Error and Appellee.

Transcript of Record.

Upon Writ of Error to and Upon Appeal from the United States District Court of the Territory of Alaska, Fourth Division

FILMER BROS. CO. PRIN'' 330 JACKSON ST., S. F., CAL.

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INDEX OF PRINTED TRANSCRIPT OF RECORD.

[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur. Title heads inserted by the Clerk are enclosed within brackets.]

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[Title of Court and Cause.]

Names and Addresses of Attorneys of Record.

JAMES J. CROSSLEY, Attorney for Defendants in Error and Appellees, Fairbanks, Alaska.

McGOWAN & CLARK, Attorneys for Plaintiffs in Error and Appellants, Fairbanks, Alaska. [1*]

In the District Court for the Territory of Alaska, 4 Division.

No. 612.

UNITED STATES OF AMERICA,
Plaintiff,

vs.

NORTHERN COMMERCIAL COMPANY & NORTHERN NAVIGATION COMPANY,
Defendants.

Praecipe for Transcript.

To C. C. Page, Clerk of the Above-named Court:

You will please prepare a transcript of the record in the above-entitled cause, to be filed in the office of the Clerk of the United States Circuit Court of Appeals for the Ninth Circuit, sitting at San Francisco, State of California, under the writ of error and appeal heretofore perfected to said Court, including all papers both on writ of error and on appeal in but one record, in accordance with the order of the above named Court of 24 May, 1913, and will include in said transcript the following papers, to wit:

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*Page-number appearing at foot of page of original certified Record.

(1) Statement of facts and stipulation for submission without action, filed 27 October, 1906;

(2) Order concerning jurisdiction of controversy and staying proceedings, filed 27 October, 1906;

(3) Judgment on report of Referee, filed 5 June, 1912;

(4) Bill of Exceptions, settled 9 December, 1912;

(5) Petition for Writ of Error, filed 20 May, 1913;

(6) Petition for appeal, filed 20 May, 1913;

(7) Assignment of errors to be used both on writ of error and direct appeal and both, filed 20 May, 1913;

(8) Order allowing writ of error and fixing bond, filed 20 May, 1913;

(9) Order allowing appeal and fixing amount of appeal bond, filed 20 May, 1913;

(10) Order relative to supersedeas bond on writ of error, filed 20 May, 1913;

(11) Bond on appeal and supersedeas, filed 20 May, 1913;

(12) Designation of place for hearing of writ of error and appeal, filed 24 May, 1913; [3]

(13) Writ of error, dated 19 May, 1913;

(14) Citation on writ of error, dated 19 May, 1913;

(15) Citation on appeal, dated 19 May, 1913;

(16) Order extending time within which to perfect appeal, filed 24 May, 1913;

(17) Praecipe for transcript;

(18) Stipulation relative to printing record;

(19) Stipulation as to tonnage tax on barges;

This transcript to be prepared as required by law, the orders and rules of this Court, and the rules of the United States Circuit Court of Appeals for the Ninth Circuit, and to be filed in the office of the Clerk of said United States Circuit Court of Appeals for the Ninth Circuit, on or before the first day of August, 1913, pursuant to the order of this Court of 24 May, 1913, extending time and ordering but one record.

McGOWAN & CLARK,
Attorneys for Defendants.

Stipulation Relative to Printing Record.

Due service of the foregoing praecipe is admitted and it is hereby stipulated that the papers and records enumerated therein shall constitute the record to be used on the hearing both of the writ of error and of the appeal direct in the above-entitled cause; that the same may be printed in one record; and that, in the printing of said record for the consideration of the said Circuit Court of Appeals for the Ninth Circuit on writ of error and appeal direct, the title of the court and cause in full on all papers shall be omitted, except on the first page of said record, and that there shall be inserted, in the place of said title in all papers, in all other parts of said record, the words "Title of Court and Cause." [4]

Dated at Fairbanks, Alaska, this second day of June, A. D. 1913.

JAMES J. CROSSLEY,
United States Attorney,
Attorney for Plaintiff.
McGOWAN & CLARK,
Attorneys for Defendants.

IV.

That during all of the times herein mentioned, the said defendant has been carrying on a transportation business on the Yukon River and its tributaries, both in the District of Alaska and Yukon Territory, Canada, and during the year 1905, operated the steamers "Sarah," "Louise," "Susie," "Seattle No. 3," "Rock Island," "Tanana," "Lavelle Young" and "Leah" in the waters of the Yukon River in the District of Alaska and in the Yukon Territory, Canada, and said steamers were not operated wholly within the District of Alaska.

V.

That during the season of 1906, the said defendant operated the steamers "Sarah," "Hannah," "Seattle No. 3," "Tanana," "Lavelle Young" and "Ida May" on the waters of the Yukon River, in the District of Alaska, and in the Yukon Territory, Canada, [7] said steamers were not operated wholly within the District of Alaska.

VI.

That during the years aforesaid, the said Company operated the steamers "Margaret," "Delta," "Isabelle" and "R. D. Campbell" on the Yukon River and its tributaries, and in the Bering Sea at points between St. Michael and Fairbanks, Alaska, and procured thereon the licenses required by Section 460 of the Code of Civil Procedure of the District of Alaska hereinbefore mentioned.

VII.

That the steamers hereinbefore mentioned in paragraphs Four and Five, and operated in Canadian

waters as aforesaid, were compelled to, and did, pay a tonnage tax of eight cents per ton on their gross tonnage to the Collector of Customs in the city of Dawson, Yukon Territory, Canada.

VIII.

That a controversy has arisen between the parties hereto as to the construction of Section 460 aforesaid, the defendant contending that it should not be compelled to pay a license of $1.00 per ton per annum on net tonnage, Custom-house measurement on such of its said vessels as were operated on the waters of the Yukon River in Alaska and on the waters of the Yukon River, Yukon Territory, Canada.

IX.

The defendant contends that it should not be required to pay a license of $1.00 per ton on any of the river steamboats operated by it, whether operated wholly on the waters of Alaska, or elsewhere.

X.

The District Attorney representing the United States of America, in the Third Judicial Division of the District of [8] Alaska, is in doubt as to the correctness of the contentions made by defendant, and admits that he is in doubt as to the proper construction of the aforesaid section, and therefore consents that the same may be submitted to the Court for construction.

XI.

That it is consented by the parties hereto that the Court may consider as a part of this statement, either the originals or certified copies of the registers of all vessels owned or operated by the defendant; the

originals or certified copies of all licenses or receipts for tonnage taxes or tonnage licenses, paid by defendant to the Customs Collectors or Officials authorized to collect the same, either in the District of Alaska, the States or Territories of the United States, and in the Dominion of Canada. And such other records as may from time to time hereafter be submitted to the Court in connection with this controversy, by consent of the parties hereto.

XII.

That it is stipulated and agreed by the defendant that it shall, as soon as possible, procure the originals or certified copies hereinbefore mentioned, and shall file the same as exhibits in connection with this statement.

XIII.

That it is further stipulated by the parties hereto, that this statement may be amended from time to time either at or before the final argument before the Court, so as to set out fully all the facts necessary to enable the Court to determine the matters in controversy.

XIV.

That it is stipulated by the District Attorney aforesaid, for and on behalf of the plaintiff, that if the Court shall determine that the defendant should have paid the licenses as aforesaid, or any of them, the defendant within five days after the final judgment in this matter, shall pay in to the Clerk [9] of this Court, the amount that it should have paid in the first instance under the section aforesaid, as a license fee, and shall pay any costs of said proceed-

ings, and that it shall be exonerated from payment of any further penalties or fines under the provisions of the Code aforesaid.

XV.

That it is stipulated by the parties hereto that there has been no endeavor on the part of the defendant to avoid payment of the licenses aforesaid if defendant is lawfully chargeable therewith, and in that connection defendant expressly avers that it is acting in good faith in this connection and stands ready and willing at any time upon request of the District Attorney to pay into the court within three days after such request, a sufficient sum of money to cover all licenses that it may be determined that it is properly chargeable with, and such further amount as will cover the costs of these proceedings, or to give such bonds therefor as shall be satisfactory to the District Attorney, or to the Court.

XVI.

It is stipulated and agreed by parties hereto that this controversy is real and that these proceedings are taken in good faith to determine the rights of the parties, and that by reason of these proceedings the defendant shall in no wise be prejudiced.

XVII.

WHEREFORE, the parties hereto do hereby submit the foregoing to the above court for its decision without action, in accordance with the provisions of Chapter 28 of the Code of Civil Procedure of the District of Alaska.

Dated, Fairbanks, Alaska, this 26 day of October, A. D. 1906.

NATHAN V. HARLAN,
District Attorney in and for the Third Division, District of Alaska,
Attorney for Plaintiff.
McGOWAN & CLARK,
Attorneys for Defendant. [10]

United States of America,
District of Alaska,—ss.

Volney Richmond, being first duly sworn, deposes and says: That the defendant is a private corporation. That I am the resident agent for the defendant above named and am the person upon whom summons should be served in an action against said defendant. That the controversy set forth in the foregoing petition is real and these proceedings are taken in good faith to determine the rights of the parties therein.

VOLNEY RICHMOND.

Subscribed and sworn to before me this 26th day of October, 1906.

[Seal] JOHN A. CLARK,
Notary Public in and for the District of Alaska.

United States of America,
District of Alaska,—ss.

N. V. Harlan, being first duly sworn, deposes and says: I am the United States District Attorney for the Third Judicial Division of the District of Alaska. That the United States is a party to the foregoing controversy; that the controversy set forth in the

foregoing petition is real and that these proceedings are instituted in good faith to determine the rights of the parties therein.

NATHAN V. HARLAN.

Subscribed and sworn to before me this 26th day of October, A. D. 1906.

[Seal] JOHN A. CLARK,

Notary Public in and for the District of Alaska.

[Endorsed]: No. 612. United States District Court, District of Alaska, Third Division. United States of America, Plaintiff, vs. Northern Commercial Co., a Corporation, Defendant. Statement of Facts and Stipulation for Submission Without Action. Filed in the District Court, Territory of Alaska, 3d Division, Oct. 27, 1906. E. J. Stier, Clerk. [11]

[Title of Court and Cause.]

Order [Directing Filing of Statement of Facts, During Proceedings, etc.].

It appearing to the satisfaction of the Court from the Statement of Facts and Stipulation entered into by and between the above named parties, that a question in controversy, which might be the subject of an action in a Court of Record, exists between said parties, and that a proper case exists for the submission of such question to the determination of this Court; and upon, motion of N. V. Harlan, Esq., United States Attorney for the Third Judicial Division, District of Alaska, attorney for plaintiff, and who is acting in this matter under advice received

propelled by mechanical power; and an order having been subsequently made by this Court that the defendant, Northern Navigation Company, be made a party defendant to this action and its name inserted as a party defendant in all proceedings herein theretofore as well as thereafter had, and that all proceedings theretofore had to apply to and cover said Northern Navigation Company the same as though it had been an original party to such proceedings, and that there should be reserved to it all rights, objections and exceptions taken at any time in this proceeding by its codefendant, Northern Commercial Company, and that all testimony and evidence introduced and produced at the trial of this action before the Judges of this Court or the Referee appointed thereby, be considered as taken on behalf of said Northern Navigation Company, and that in the said Referee's report, if he should find any such license fee or tax to be due from either of said defendants, or from both of them, he would also find the amount due from each of them [14] respectively, and that judgment should be rendered in this action against each defendant for the amount found by said Referee to be due from such defendant; and the said Referee having been attended by the respective parties and their counsel and having taken testimony as to the amount due from each of said defendants by reason of the license fee or tax upon the steamers of each of said defendants registered in Alaska and propelled by mechanical power for the years 1905 to 1911, inclusive, and having heretofore on the 16th day of May, 1912, filed

his report in writing, in which report it appears that there is due from the Northern Commercial Company, a corporation, the sum of Five Thousand Ninety Dollars ($5090.00) for such license fee or tax on such steamers operated by it during said years, and that there is due from the defendant, Northern Navigation Company, a corporation, the sum of Twelve Thousand Three Hundred Eight-four Dollars ($12,384.00), for such license fee or tax upon such steamers operated by it during said years, which report of said Referee contains findings of fact and conclusions of law which, by consent of counsel for the respective parties hereto, may be used by the Court as its and in lieu of findings of fact and conclusions of law of this Court, the defendants reserving an exception as to substance, but waiving objection as to the form thereof, and the above-named defendants having made a motion to set aside and having filed objections and exceptions to the said report of said Referee, or certain parts thereof, which motion, objections and exceptions have been heretofore overruled by the Court, to which ruling defendants excepted, which exception is hereby allowed.

NOW, THEREFORE, on motion of counsel for plaintiff, It is ordered, adjudged and decreed that the said report of the Referee, including the aforesaid findings of fact and conclusions of law, be in all respects approved and confirmed.

It is further ordered, adjudged and decreed that the above named plaintiff, the United States of America, do have and [15] recover of and from the defendant, Northern Commercial Company, a

corporation, the sum of $5,090.00.

It is further ordered, adjudged and decreed that the above named plaintiff, the United States of America, do have and recover of and from the defendant, Northern Navigation Company, a corporation, the sum of $12,384.00.

It is further ordered, adjudged and decreed that the above named plaintiff, the United States of America, do have and recover of and from the defendants, Northern Commercial Company, a corporation, and Northern Navigation Company, a corporation, its costs and disbursements incurred in this proceeding to be taxed by the Clerk of this Court, the same to be apportioned between the two defendants above named in the proportion of the amount in which judgment is hereby rendered against each of them respectively.

Done in open court this 5th day of June, 1912.

PETER D. OVERFIELD,
District Judge.

Entered in Court Journal No. 12, page 51.

[Endorsed]: Original. No. 612. In the District Court of the United States for the Territory of Alaska. United States of America, vs. Northern Commercial Co. and Northern Navigation Co. Judgment on Report of Referee. Filed in the District Court, Territory of Alaska, 4th Div. Jun. 5, 1912. C. C. Page, Clerk. By H. C. Green, Deputy. [16]

[Title of Court and Cause]

Bill of Exceptions.

BE IT REMEMBERED that the above-entitled cause came on duly and regularly to be heard on Saturday, the nineteenth day of August, A. D. one thousand nine hundred, and eleven, at Fairbanks Alaska, before the Honorable Peter D. Overfield, Judge of said Court, and the Honorable Edward E. Cushman, Judge of the District Court of the Territory of Alaska, Third Division; the Government being represented by the Honorable James J. Crossley, United States Attorney for the Fourth Division of Alaska, and the Honorable John Knox Brown, Assistant United States Attorney for said Fourth Division; the defendant company being represented by its attorneys and counsel, Messrs. McGowan & Clark. Whereupon the following proceedings were had and testimony was taken: [17]

[Proceedings Had August 19, 1911.]

Mr. CROSSLEY.—In this case the stipulations filed are in the nature of a demurrer to the right of the Government to secure a license tax, and I do not know whether the Court will hold that the Government shall open and close or it is for the defendant to open the matter.

Judge CUSHMAN.—I think as you are making the demand, the Government seeking money it has not got, that you are entitled to the opening and close.

Mr. CROSSLEY.—I might suggest to the counsel for the defense that if they wish to prove any facts

in the matter, I presume the evidence should precede the argument we wish to make.

By the COURT.—I think any evidence should be put in now. I see, in some of these cases, that the company owning the vessels was to supply, within a certain length of time, certain papers.

Mr. McGOWAN.—We will take up 612 first, the United States versus The Northern Commercial Company, and in the following case, which is against the N. A. T. & T. Co., the stipulation provides that that case shall abide the result of the N. C. case, so I presume for the purpose of the record it will be understood that 612, United States versus Northern Commercial Company, be taken up at this time and that the case as far as the N. A. T. & T. Co. is concerned, be continued indefinitely pending the decision on this. In the event of an appeal, there is no use taking all the cases up; 612 is the first one.

By the COURT.—And 657?

Mr. McGOWAN.—Yes, sir. Now, with reference to 612, I spoke to Mr. Crossley this morning. We mention some twelve or fourteen steamers, and, for the purpose of getting the facts [18] before the court, it was my idea we could simply deposit the tonnage receipts for one of the boats; there is no use of encumbering the record, and I ask to amend the stipulation by adding the following to it:

> "That in the event the court shall determine that the defendant shall pay tonnage tax or fee under the section hereinbefore mentioned, that thereupon a referee may be appointed by the

court to ascertain the amount of tonnage upon which said fee shall be paid."

If the Court will refer to the original stipulation, it will notice that Paragraph 18, which is the last paragraph of the stipulation, is in blank, and that clause was inadvertently, at the time this stipulation was drawn, left out. Right after 18 it reads: "Wherefore the parties hereto do hereby submit the foregoing facts to the above court for its decision, etc." That clause is in the other cases; I think you will find that in Section 14 in the warehouse cases.

Mr. CROSSLEY.—The word "facts" is written in after the word "foregoing"?

Mr. McGOWAN.—Yes, sir. It is further stipulated by the parties hereto that in the event that the above court should determine herein that defendant should pay the license fee aforesaid, that thereupon a referee may be appointed to ascertain the amount of tonnage upon which such fee should be paid, etc. That is in the other cases and has been left out of the stipulation, apparently inadvertently. If that is not put in at the present time the Court would have to go through all the steamboats and check up their tonnage fees. We do not desire to place the Court or clerk's office to any inconvenience; we desire to supply all data. [19]

Mr. CROSSLEY.—We wish to ask counsel for defendants if they admit they paid no license in the Territory of Alaska on these steamboats—is that admitted in the stipulation?

Mr. McGOWAN.—Yes, sir; that is admitted. I think the questions you ask about the admissions are

contained in the statement of the controversy, Paragraph 7—

> "That the steamers hereinbefore mentioned in Paragraphs 4 and 5 and operated in Canadian waters as aforesaid were compelled to and did pay a tonnage tax of eight cents per ton on their gross tonnage to the collector of customs in the City of Dawson, Yukon Territory, Canada."

We will admit that the steamers in controversy in this action paid no tonnage tax or license fees under Section 460 during the years 1905 and '6 in Alaska.

Mr. CROSSLEY.—That is satisfactory.

Mr. McGOWAN.—I have the statutes of Canada—it is Section 37 of Chapter 46 that I wish to offer in evidence; do you admit the authenticity of this?

Mr. CROSSLEY.—I think we will admit the authenticity of this law, but we object to it as incompetent, irrelevant and immaterial in this case, since any tax imposed there would be immaterial as to any tax imposed here.

By the COURT.—You are simply offering that to show that the tax paid there was paid in pursuance of law?

Mr. McGOWAN.—Yes, sir.

Objection overruled. Exception allowed.

Mr. McGOWAN.—We offer in evidence, then, at this time, Orders in Council of the Imperial Government and Treaties Negotiated between Her Majesty, The Queen, & the Foreign Powers, printed at Ottawa by Samuel Edward Dawson, Law Printer (For Canada) to the Queen's Most Excellent Majesty, A. D. 1898, and the particular part we desire to offer in

evidence is Section 37 of Chapter 46, 61 Victoria, found upon page 200 of this volume, which reads as follows: [20]

[Defendant's Exhibit No. 1—Section 37 of Chapter 46, 61 Victoria.]

"Inspection Fees. Section 37. The owner or master of every steamboat in Canada shall pay yearly and every year a rate or duty fixed by the Governor in council and not exceeding ten cents for every ton gross which such steamboat measures, and the owner or master of every passenger steamboat exceeding 100 tons gross shall pay an inspection fee of eight dollars for each inspection made imperative by this Act, etc."

The first part is all we desire to offer.

Mr. CROSSLEY.—To which we object as incompetent, irrelevant and immaterial, for the reason that this is a statute of a foreign country and has nothing to do with taxation in the Territory of Alaska.

Objection overruled and exception allowed. The portion of the section above read is admitted in evidence and marked Defendant's Exhibit Number 1 (Case No. 612).

Mr. McGOWAN.—We have the receipts here covering all the steamboats, but I will simply tender one for each year. This is for the steamer "Sarah" for 1905.

Mr. CROSSLEY.—As to those receipts, we admit the genuineness of them, but we object upon the same ground as we did to the statute of a foreign country, that they are incompetent, irrelevant and

immaterial, not either tending to prove or disprove whether the defendants should pay the tax in the Territory of Alaska.

By the COURT.—We do not mean to admit that they are controlling, but in order that everything may be before the Court, the objection will be overruled, and you will be allowed an exception.

Mr. McGOWAN.—(Reading:)

[Defendant's Exhibit No. 2—Steamboat Tonnage Dues.]

"STEAMBOAT TONNAGE DUES.

June 12, 1905.

Number—75
Port of—Dawson, Y. T.
Name of Steamer—Sarah. [21]
Master's Name—M. M. Looney.
Owner's Name—Northern Commercial Company.
Port of Registry—St. Michael, Alaska.
Gross tonnage—1211.
Registered Tonnage—728.
Dues, Year 1905—1211 tons at 8 Cts.....$96.88
Inspection Fee..... ... 8.00

$104.88

Date of last payment—11th of June, 1904.
Place of last payment—Dawson, Y. T.
Canada, Yukon Territory,
Office Collector of Customs, Port of Dawson. To Wit:

The foregoing is a true and correct copy of entry in books of this office showing the tonnage dues paid,

the same being the stub of receipt issued from this office.

Dated July 8, 1909.

J. H. McLEOD,

For Acting Collector of Customs Dawson, Y. T."

Stamped with the official customs seal, which reads:

"Seal
The Customs—Canada
July 8, 1909
Dawson, Y. T."

Mr. CROSSLEY.—To which we make the same objection.

Objection overruled and plaintiff allowed an exception.

The above receipt is admitted in evidence and marked Defendant's Exhibit Number 2 (Case Number 612).

Mr. McGOWAN.—The next receipt we offer is the same except it is for the year 1906.

It is admitted under the same objection and exception and is marked Defendant's Exhibit Number 3 (Case No. 612) and reads as follows:

[Defendant's Exhibit No. 3—Case No. 612—Steamboat Tonnage Dues.]

"STEAMBOAT TONNAGE DUES.

5th June, 1906.

Number— [22]
Port of—Dawson, Y. T.
Name of steamer—Sarah.
Master's Name—M. M. Looney.
Owner's Name—Northern Commercial Company.

Port of Registry—St. Michael, Alaska.
Gross Tonnage—1211.
Registered Tonnage—728.
Dues, Year 1906—1211 tons at 8 Cts.—$96.88
Inspection fee—

$96.88

Date of last payment—June 12, 1905.
Place of last payment—Dawson, Y. T.
Canada, Yukon Territory,
Office, Collector of Customs, Port of Dawson. To Wit:

The foregoing is a true and correct copy of entry in books of this office showing the tonnage dues paid, the same being the stub of receipt issued from this office.

Dated July 8, 1909.

J. H. McLEOD,
For Acting Collector of Customs, Dawson, Y. T."

Stamped with the official customs Seal as follows:

"Seal
The Customs—Canada
July 8, 1909
Dawson, Y. T."

Mr. McGOWAN.—Here is something I obtained under the suggestion of the former District Attorney. It is an analysis by a leading professor of California on this section—I don't know whether it is admissible as evidence or not but if you have no objection we will let it go in for what it is worth.

Mr. CROSSLEY.—I don't suppose I will object to counsel using it in argument but I do object to it

as incompetent, irrelevant and immaterial as evidence. [23]

Whereupon the grammatical analysis referred to was handed to the Court, counsel for defendant stating that it was in the nature of expert testimony. The Court announced that it would not be necessary for counsel to read the same, but that it would be considered with the testimony in the case. The said analysis was as follows, to wit:

[Analysis of Section 460, Criminal Code of Alaska.]

UNIVERSITY OF CALIFORNIA.

Department of English.

Berkeley, Nov. 27th, 1910.

William Thomas, Esq.,

San Francisco.

My dear Mr. Thomas:

In regard to Sec. 460 of the Criminal Code of the District of Alaska, I must premise by reminding you that the words "doing business wholly within the District of Alaska" are not the *predicate* of the sentence, but an adjective or participial phrase used as a modifier to restrict or qualify the scope of a noun. I say this because in your letter of Nov. 11th, you inadvertently speak of those words as a "predicate," and we might misunderstand each other.

Before entering upon the grammatical analysis of the passage in question I answer briefly your leading question as follows: You can not refer back the adjective phrase, "doing business wholly . . . . Alaska" to (1) vessels registered in Alaska, or to (2) those not paying license, etc., or with *grammatical* certainty even to (3) river and lake steamers.

The punctuation makes it refer exclusively to "transportation lines" immediately preceding it.

But the grammar and punctuation of the statute are in this and other respects so equivocal and obscure that I have reason to believe that your through boats from St. Michael to Dawson are not by the terms of the statute liable for the tonnage license;—as the following analysis may perhaps prove.

My general knowledge of the subject of customs, etc., leads me to surmise that the author of the statute intended by the first clause, sea-going lines whose home-port was in Alaska; by the second [24] clause, vessels or lines whose home-port was not in Alaska, which were registered elsewhere—say in San Francisco or Seattle—but were doing business with Alaska ports; by the third, lines and steamers plying wholly within Alaska. But I have laid aside any attempt to reconcile the author's intention with the possible ordinary categories, and have aimed to show, what I sincerely believe, that his grammar (his use of words and punctuation) is so careless or equivocal that the statute as drawn can not hold water.

If you want more authority for any specific statements, let me know.

I should have sent you this sooner, but since you did not answer my letter in which I doubted whether I could endorse your view of a certain phrase, I thought you had given me up.

Yours ever,

C. M. GAYLEY.

ANALYSIS.

Definitions:

"A predicate is the word or words which express what is affirmed or denied of the subject." It includes a verb. (Century Dictionary.)

A group of words expressing a statement, command or question is called a sentence; a combination of subject and predicate. (Abbot, How to Parse, p. 153.—Century Dictionary, "Sentence.")

"A sentence is *compound* if containing more than one subject or predicate or both." (Century, "Sentence" 4.)

"A clause is one of the lesser sentences which united form a compound sentence." (Century, "Clause" 3.)

"The members of a compound sentence are co-ordinate clauses." (Century, "Clause" 3.)

The passage of Sec. 460 (Criminal Code, Alaska), beginning with the word "freight" and ending with the word "vessel," is a compound sentence made up of three clauses intended to be co-ordinate, each of which consists of a noun or nouns, with modifiers, as *subject* and of a predicate in common,—the verb (contained in the preceding **[25]** paragraph, and understood in this) "shall pay" with its object and modifiers, "one dollar per ton . . . . vessel."

The subject of the first clause is "freight and passenger transportation lines" modified by the adjective phrase ("A *phrase* is a group of words expressing a meaning but not a statement." Abbott, How to Parse, p. 153.) "propelled by mechanical power registered in the district of Alaska." (By the way,

I pause to ask here whether the statute means that the "lines" are registered, of "the mechanical power." It says the "power"; if it had meant to say the "lines" are registered, it ought to have had a comma after the word "power" (Lamont, English Composition, p. 278; Perry, Punctuation Primer, p. 16), so that the "lines" would be defined both by their propulsion and by their registering. As the statute reads, lines whose mechanical *power* is *not* registered do not have to pay tonnage.) The predicate is "shall pay," etc.

The second clause is introduced by the first "or" (of the ambiguity of which much will be said later) and consists of "freight and passenger . . . . lines," understood from the former clause, with the modifying adjective phrase "not paying license or tax elsewhere." The predicate is "shall pay" etc.

The third clause is introduced by the "and" following "elsewhere," and consists of the subject "river and lake steamers, as well as transportation lines doing business wholly within the district of Alaska." The predicate is "shall pay," etc., as before.

Since the first and second of these subjects have the same noun in common, "freight . . . . transportation lines," and are connected by the conjunction "or," which is equivocal in effect according as it implies or does not imply an alternative, I shall postpone their consideration and take them up together, after the subject of the third clause has been discussed.

The third clause is introduced by the copulative

or additive conjunction "and." Its subject is two-fold, first—"river and lake **[26]** steamers" (terminated by a comma, as if segregating them from the second part of the subject, and to show that that second part is modified separately). (Lamont, p. 276; Perry, p. 18 (c).) and second—"transportation lines doing business wholly within the district of Alaska." The adjective phrase "doing business . . . . Alaska" indubitably modifies the noun preceding it, "transportation lines," and is restrictive of it and restricted to it because it is not separated from it by any mark of punctuation. In fact, the use of the conjunction "as well as" instead of the ordinary "and" would indicate the author's intention of setting off the following transportation lines" with its special restrictive "doing business wholly in Alaska" as an independent subject complete in itself.

If there had been no comma after "steamers" the nouns italicized, "river and lake *steamers* as well as *transportation lines"* would by punctuation be modified—both of them—by the adjective phrase "doing business . . . . Alaska." As the punctuation stands, the phrase "doing business . . . . Alaska" can be interpreted only logically or by implication to modify the "river and lake steamers." Grammatically it does not. Still less can it be taken to modify more remote subjects preceding the adverb "elsewhere" and the additive conjunction "and." In fact, as the statute reads, this punctuation makes all "river and lake steamers" whether "doing business wholly in Alaska" or not a subject of the predi-

cate "shall pay one dollar per ton," etc. And that, I presume is equivalent to stating that the drafter of the statute unintentionally reduced the law to absurdity.

If, on the other hand, there had been a comma after the words "as well as transportation lines," so that the clause ran "and river and lake steamers, as well as transportation lines. doing business wholly within the district of Alaska," that comma would have set off the adjective-phrase "doing business in Alaska" in such a way as that it would not modify *exclusively* the immediately preceding **[27]** "transportation lines" (Lamont, p. 278), but would or might modify and explain each of the preceding co-ordinate subject-nouns of the series; not only "river and lake steamers" but also the "freight and . . . . transportation lines" of the two clauses preceding the word "elsewhere."

Still, though the restrictive phrase "doing business wholly within . . . . Alaska" does not refer, by punctuation or grammatically, to any of the preceding subject-nouns before "as well as," it would appear that in grammatically specifying the payment of tonnage for "transportation lines doing business wholly in . . . . Alaska," the statute exempts, grammatically, such transportation lines as are doing business partly within and partly without the district from that payment, and that it logically identifies such lines with those whose existence is implied by the second clause above, viz., those which are paying license or tax elsewhere than in the district of Alaska.

Turning now to the clauses preceding the word "elsewhere," we note that the subject-noun of the first runs from the word "freight" to "lines," and is modified by the adjective-phrase "propelled by mechanical power registered in the district of Alaska." This subject noun has for its predicate "shall pay one dollar per ton," etc. But the subject-noun "freight-lines" is restricted grammatically to those "propelled by mechanical power registered in . . . . Alaska" not to those "propelled by mechanical power" which, in addition, happen to be "registered in Alaska," but to those exclusively whose *mechanical power is registered* in Alaska.

The subject-noun of the second clause is the same as that of the first "freight and . . . . lines," and is modified by the adjective or participle phrase "not paying license or tax elsewhere." This subject is connected with that of the former clause by the conjunction "or," and is also the subject of the predicate "shall pay" etc.

Now, these subjects of clauses 1 and 2, with their common predicate **[28]** may be construed grammatically (A) as co-ordinate clauses, i. e., "of equal rank or order" (Whitney, Essentials Engl. Grammar, 148), or in another way (B) of which I shall speak later.

The subjects of (1) and (2) are joined by the conjunction "or," which, if we regard the clauses as (A) *co-ordinate,* may be either (1) *disjunctive*, or (2) *expressive of equivalence.*

If A (1), *disjunctive,* the "or" implies an alternative (Whitney, p. 148) between the two clauses; that

one may be substituted for the other (Century Dictionary, "Or", I). The "or" co-ordinates two clauses, "each one of which in turn is regarded as excluding consideration of the other." (Century Dict. "or" Ia), In that case, grammatically, "freight and passenger . . . . lines . . . . Alaska" is one subject of the predicate "shall pay," etc., and "freight and passenger . . . . lines not paying license or tax elsewhere" is a distinct subject "excluding consideration of the other" (Century), viz., of those whose "mechanical power is registered in Alaska." That is to say, whether the author of this language meant so or not, the second clause excludes entirely the question of registration either of "lines" or of "mechanical power" only and states that lines paying license or tax elsewhere, are, by implication, not the subject of the predicate "shall pay one dollar per ton," etc.

If A (2), the "or" is *expressive of equivalence,* it is "a conjunction co-ordinateing two or more words or clauses each of which in turn is regarded as the equivalent of the other or others. Thus, we say of a particular diagram that it is a square *or* a figure with four equal sides and equal angles." (Century Dictionary, "Or" (b).) In that case the writer of the statute has said "these lines shall pay tonnage; freight and passenger . . . . lines . . . ., registered in Alaska, *or* (as equivalent of the meaning of the former clause) these lines that are not paying license, etc., elsewhere." So again the statute has, wittingly or not, provided by its grammatical construction that **[29]** the lines which "pay

license or tax elsewhere'' shall be regarded as in the same category with those which are *not* registered, or whose mechanical power is *not* registered in Alaska; that is to say, in the category of those not subject to pay tonnage.

But there is still a further obscurity in the phraseology of the statute, owing to the unfortunate use of the word ''or,''—that is

(B), *the equivocal effect of ''or.''* Alexander Burrill in his Law Dictionary and Glossary of 1850 (see Worcester's Dictionary, under ''Or'') says *''Or,* in written instruments, is frequently construed to mean *and,* where such construction is necessary to effectuate the intention of the parties. It has been said that there is perhaps no word in the language of more equivocal effect than *or.* Hence in England it has been excluded from indictments, though it has been admitted in American practice.'' With this interpretation of the drafter's intention the clauses as written may mean ''lines registered in, or mechanical power registered in Alaska, *and* not paying license elsewhere.'' In that case since the ''and'' may convey the illative force of ''consequently,'' or the conditional force of ''provided,'' the writer of the statute has by his grammatical construction, exempted from the force of the predicate ''shall pay'' lines registered, or whose mechanical power is registered, in Alaska, which are already paying license or tax elsewhere.

C. M. GAYLEY. **[30]**

Now, I would like to ask counsel for defendant if they are willing to admit at this time that all the

business their steamboats do, that is, connected with this case, is done on the Yukon and its tributaries below Dawson and that the greater part of their business is done upon the rivers rather than in Yukon Territory.

Mr. McGOWAN.—That is correct, we will admit that we touch at two ports in the Yukon Territory, carrying freight to two ports, Forty Mile and Dawson.

Mr. CROSSLEY.—That is, all the business done by the company is done from St. Michaels and Nome on the Yukon and its tributaries in Alaska.

Mr. McGOWAN.—Yes, sir, with two terminuses, one being St. Michaels in Alaska and the other being Dawson in Yukon Territory.

By the COURT.—Are all these vessels registered at St. Michael?

Mr. McGOWAN.—Yes, sir.

Mr. CROSSLEY.—You will admit that all these vessels are registered at St. Michaels?

Mr. McGOWAN.—Yes, either St. Michaels or Eagle.

Mr. CROSSLEY.—All within the Territory of Alaska?

Mr. McGOWAN.—Yes, sir.

Mr. CROSSLEY.—Will you also admit that your company owning these boats pays no license or tax anywhere else in the United States on these boats?

Mr. McGOWAN.—We pay the general taxes, I presume, in the State of California on the assets of the entire corporation.

Mr. CROSSLEY.—But no license or tax, no spe-

cific license or tax upon the steamboats that are in issue in this case?

Mr. McGOWAN.—Yes, we also pay the United States Government—taking the Steamer "Sarah" for the year 1906—June 23, 1906, tonnage dues $19.17; Government receipt Number 9501, attached **[31]** to original cash voucher Number 51 of June 23, 1906, on steamer "Sarah"; that is tonnage tax paid by the boat once a year at Eagle or St. Michaels.

Mr. CROSSLEY.—But no license or tax?

Mr. McGOWAN.—No, tonnage dues only—railroad or tonnage dues.

Mr. CROSSLEY.—That is a uniform tax over the United States?

Mr. McGOWAN.—That is a uniform tax over the United States. They also pay that.

Mr. CROSSLEY.—But you do admit there is no other license or tax paid within the jurisdiction of the United States other than that?

Mr. McGOWAN.—Yes, sir. I have the voucher for this, showing we also paid that in 1906—that was paid in each year 1906 and 1905.

Mr. CROSSLEY.—What I want to get at is that no other tax or license fee was paid in any other state or territory of the United States.

Mr. McGOWAN.—That is correct.

Mr. CROSSLEY.—I understood Mr. McGowan to say that he wished to introduce some evidence on the wharfage matter, but that would be in the other case and I do not know of anything we care to introduce in this matter, since the real issues have been

admitted by the defendant and the Government respectively.

Evidence in Case Number 612 closed. **[32]**

That after said testimony was closed, argument was made by the counsel for the respective parties, after which the Court took the matter under advisement.

That thereafter, and on the 24th day of August, 1911, the Court, by consent of counsel for plaintiff and defendant, made and entered an order in the words and figures as follows, to wit: **[33]**

[Title of Court and Cause.]

Order [Directing Amendment of Statement of Facts, etc.].

The above-entitled action having come on for trial before the Court, and the Court having given its ruling upon the construction of the statute in controversy, whereby it ruled that the defendant is liable for the payment of the license or tonnage tax mentioned in the original Statement of Facts on file in this action and it appearing to the Court that this action had been pending since the year 1906, and that in the interim the defendant has not paid the said license or tonnage tax upon the steamboats operated by it during each year, and for the purpose of avoiding multiplicity of actions and settling all differences between the parties to this action, in relation to the controversy herein, and so that the rights of the respective parties may be fully adjudicated up to the year 1911—the defendant having announced that he intends to appeal from the ruling of this Court aforesaid—and for the purpose of having all matters in

controversy between said parties up to the present year made a part of the record herein, so that the same may be fully considered upon appeal, and the attorneys for the respective parties having consented to the making of this order,

IT IS HEREBY ORDERED

that the original Statement of Facts filed herein be amended and supplemented by adding thereto the amended and supplemental paragraphs hereunto annexed, marked respectively, "XVII" and "XVIII," and that said paragraphs shall be considered as a part and portion of the original statement of Facts filed in the above-entitled action. **[34]**

IT IS FURTHER ORDERED:

That said original Statement of Facts need not be engrossed and that the said paragraphs shall be considered as a part thereof, and the verification of the same need not be made, and that the Clerk of the Court shall attach the same, together with this order, to the original statement of facts filed in this action.

IT IS FURTHER ORDERED:

That the said Amended and Supplemental paragraphs be filed herein *nunc pro tunc* as of the 18th day of August, 1911.

EDWARD E. CUSHMAN,
PETER D. OVERFIELD,
Judge.

Dated Aug. 24, 1911.

Entered in Court Journal No. 11, page 396.

[Indorsed]: No. 612. (Title of Court and Cause.) Order. Filed in the District Court Territory of

Alaska, 4th Div. Aug. 24, 1911. C. C. Page, Clerk. By G. F. Gates, Deputy.

That attached to the foregoing Order is the following: [35]

[Title of Court and Cause.]

Amendment to Statement of Facts and Supplemental Statement of Facts.

Insert on page six (6) of original Statement of Facts and Submission Without Action, after "XVII," the following:

"That in the event that the Court shall determine herein that the defendant shall pay any license tax or fee under the Section hereinbefore mentioned, that thereupon a Referee may be appointed by the Court to ascertain the amount of said license tax or fees and report the same to the Court; said report to be subject to review by the Court, the same as in other matters."

XVIII.

That since the filing of the original Statement of Facts in this action and during the years 1907, 1908, 1909, 1910 and 1911, defendant has been operating boats on the Yukon River in the same manner as set out in the original statement of facts herein, and in connection with these years it is consented that the Court in determining this action, shall determine whether or not the said defendant is liable to pay a license tax upon the steamboats operated by it during said years, and the amount thereof; that is to say, that the Court

shall have jurisdiction in the present action to determine the controversy between the parties plaintiff and defendant from the year 1905 down to and including the year. 1911.

Dated August 24, 1911.

McGOWAN & CLARK,
Attorneys for Defendant.

The foregoing Amendment and Order are hereby consented to.

JAMES J. CROSSLEY,
Attorney for Plaintiff,
McGOWAN & CLARK,
Attorneys for Defendant.

[Indorsed]: No. 612. Filed in the District Court, Territory of Alaska, 4th Div. Aug. 24, 1911. C. C. Page, Clerk. By G. F. Gates, Deputy, *nunc pro tunc* as of Aug. 18, 1911. [36]

That thereafter, and on the 24th day of August, 1911, the Court made and entered its interlocutory order, which was as follows:

[Title of Court and Cause.]

Order [That Northern Commercial Co. is Liable for License Tax; Directing Filing of Amended Statement of Agreed Facts, etc.].

This cause having come on for trial on the 19th day of August, 1911, before the Honorable Edward E. Cushman, Judge of the District Court for the Third Judicial Division of the Territory of Alaska, and the Honorable Peter D. Overfield, Judge of the District Court for the Fourth Division of the Territory of Alaska, the plaintiff appearing by James J.

Crossley, United States Attorney, and John K. Brown, Assistant United States Attorney, and defendant appearing by Messrs. McGowan & Clark, its attorneys, and a jury trial having been expressly waived by the respective parties hereto in open court, and the Court having heard all the evidence of the respective parties bearing upon the question of the liability of the defendant to pay a license tax to the plaintiff upon the net tonnage of its steamships, as provided by Section 460, of the Act of Congress entitled "An Act to define and punish crime in the District of Alaska and to provide a Code of Criminal Procedure for said District," approved March 3, 1899, as amended by Section 29, Title I of the Act of Congress entitled "An Act making further provision for a Civil Government for Alaska, and for other purposes," approved June 6, 1900; and the Court having on said [37] day ruled and held that the defendant is liable for the payment of such license tax, and it further appearing that it is advisable that all the matters of difference between the plaintiff and the defendant arising out of the nonpayment of said license tax for the years 1905, 1906, 1907, 1908, 1909, 1910 and 1911, be adjudicated in this action, and that the agreed statement of facts herein be amended accordingly and filed *nunc pro tunc* as of the 18th day of August, 1911, and that further evidence will be necessary in order to show the amount of said license tax on the several steamships of defendant for the several years mentioned in said amended and agreed statement of facts herein, and that such further evidence herein may be taken be-

fore a referee and reported to this Court and James J. Crossley, Esq., United States Attorney for the Fourth Judicial Division of the Territory of Alaska, on behalf of the United States, and Messrs. McGowan & Clark, attorneys for the defendant and on behalf of the defendant, appearing this day in open court, and consenting and agreeing to the entry of this order and to each and every one of its terms and conditions, save and except that counsel for defendant objects to the ruling of the Court as to any liability on its part for any license tax whatever and excepts thereto;

NOW, THEREFORE, IT IS ORDERED that the defendant, the Northern Commercial Company, a corporation, is liable to pay to the United States a license tax of $1.00 per ton, per annum, for the years 1905 to 1911, both inclusive, on the net tonnage, custom house measurement, of each of its freight and passenger steamships registered in the District of Alaska and propelled by mechanical power.

It is further ordered that an amended statement of agreed facts be filed herein *nunc pro tunc* as of the 18th day of August, 1911, containing a statement of the facts in controversy between [38] the parties hereto as to such license tax on the net tonnage of its steamships for the years 1905 to 1911, both inclusive, instead of for the years 1905 and 1906, and that when judgment shall be entered herein, such judgment shall be for the whole amount of said license tax for the years 1905 to 1911, both inclusive; and it is further ordered that Guy B. Erwin, Esq., an attorney of this Court, be and he is hereby ap-

pointed as Referee herein to take and report the above evidence and he is hereby ordered to proceed to hear proofs and take testimony as to any and all matters and things involving or respecting the amount of such license tax for said years, and that such Referee report said testimony to this Court on or before the 31st day of March, 1912, and that such Referee be paid for his compensation the sum of $15.00 per day for each and every day necessarily spent by him in the performance of his duties as such Referee and $7.50 a day for any fraction of a day so spent, besides $1.00 per page for a transcript of the testimony, exclusive of any original exhibits thereto attached, and that such compensation shall become a part of the costs in this case and may be taxed by the prevailing party, if paid by it, against the losing party as a portion of its taxable costs and disbursements in this action.

It is further ordered that either of the Judges above named, or any Judge of the District Court of the Territory of Alaska, having or exercising jurisdiction within the Fourth Judicial Division of said Territory, may make, enter and sign any order hereafter made and entered in this cause or any judgment herein.

It is further ordered that this cause be and it is hereby continued for further hearing until after the filing by the above-named Referee of his report of the testimony taken by him herein, as herein provided, each of the parties hereto consenting and agreeing in open court that such continuance shall in nowise affect the jurisdiction of this Court to pro-

ceed further in the case [39] upon the coming in and filing of said Referee's report.

Done in open court this 24th day of August, 1911.

PETER D. OVERFIELD,
EDWARD E. CUSHMAN,
District Judges.

Entered in Court Journal No. 11, page 390.

[Indorsed]: No. 612. (Title of Court and Cause.) Order. Filed in the District Court, Territory of Alaska, 4th Div. Aug. 24, 1911. C. C. Page, Clerk. By H. C. Green, Deputy.

To a portion of which interlocutory order and judgment, defendants excepted and presented and had allowed a Bill of Exceptions, which was in the words and figures as follows: [40]

[Title of Court and Cause.]

Bill of Exceptions [To Order Filed August 24, 1911].

BE IT REMEMBERED: That on the 24th day of August, 1911, during the trial of the above-entitled action the Court made and filed its order, wherein it ruled that the defendant was liable for such license fee, and ordered "that the defendant, the Northern Commercial Company, a corporation, is liable to pay to the United States a license tax of $1.00 per ton, per annum, for the years 1905 to 1911, both inclusive, on the net tonnage, custom-house measurement, of each of its freight and passenger steamships registered in the District of Alaska and propelled by mechanical power." To which ruling and the part of said order above specified the defendant then and there excepted, and does now except

to the same, and assign the same as error.

Dated August 24, 1911.

McGOWAN & CLARK,
Attorneys for Defendant.

ORDER.

The above exception is hereby allowed and the foregoing Bill of Exceptions is hereby settled and allowed.

Done in open court this 24th day of August, 1911.

PETER D. OVERFIELD,
EDWARD E. CUSHMAN,
Judges.

Entered in Court Journal No. 11, page 700. [41]

[Indorsed]: No. 612. (Title of Court and Cause.) Bill of Exceptions. Filed in the District Court, Territory of Alaska, 4th Div. Aug. 24, 1911. C. C. Page, Clerk. By G. F. Gates, Deputy.

That thereafter such proceedings were had that the matter came on regularly for hearing before the Honorable Guy B. Erwin, Referee, appointed by this Court, on the 1st day of February, 1912, at the hour of 11 o'clock in the forenoon, at the office of said Referee in the Red Cross Building in the town of Fairbanks, pursuant to the notice of hearing issued and served on the attorneys for respective parties by the Referee on the 20th day of January, 1912; Honorable James J. Crossley, and the Honorable John K. Brown, appeared for the United States, and John A. Clark, Esq., appeared for the defendant; at which hearing, and subsequent hearings, the following proceedings were had and testimony was taken. [42]

[Title of Court and Cause.]

Report of Procedure and Testimony Before Referee.

This matter came on before the referee on the 1st day of February, 1912, at the hour of 11 o'clock in the forenoon, at his office in the Red Cross Building, pursuant to the Notice of Hearing issued and served on attorneys for the parties by referee on the 20th day of January, J. J. Crossley and J. K. Brown, appearing for the United States, and John A. Clark appearing for the defendant.

Hearing continued upon motion of attorney for defendant until 2 P. M.

The parties appeared by their attorneys at 2 o'clock P. M. on the 1st day of February, and defendants filed a petition for continuance to the 20th day of February, 1912, at 2 o'clock P. M. Continuance granted until February 5th.

On February 5th, the parties by their respective attorneys aforesaid appeared, and at the request of attorneys for defendant the matter was continued until February 6th, 1912.

On February 6th, 1912, the parties appeared before the referee by their attorneys above named, and on motion of attorney for the defendant and by consent the matter was continued until the 20th day of February, 1912.

On February 20th, 1912, the matter was continued by consent of attorneys until March 15th, 1912.

On March 15th, 1912, the parties appeared by their attorneys aforesaid, and the following proceedings were had:

By Mr. CLARK.—We now offer for the inspection of the referee, and [43] to enable him to formulate his report subject to being properly sworn to by Mr. Richmond or Mr. McGowan, a tabulated list of all of the boats of the Northern Commerical Company and the Northern Navigation Company operating in waters of the interior of the Territory of Alaska for the years 1905 to 1911, inclusive, showing particularly the boats that were operated foreign, that is to say, operating between Yukon River points in Alaska and Yukon River points in Canadian Territory showing the net tonnage of each of said boats, and offer in support and as evidence of the tonnage of each of said boats the Government Compilation known as the Forty-second Annual List of Merchant Vessels of the United States, with official numbers and signal letters, etc., compiled under the authority and by the Department of Commerce and Labor in its Bureau of Navigation, and being for the year ending June 30th, 1910.

Mr. CROSSLEY.—To which we object as incompetent, irrelevant and immaterial, for the reason that the same is not properly identified or sworn to by witnesses competent to testify to the same, there being no witnesses to identify and swear to the same.

By REFEREE.—Tabulated list and book accepted for purpose offered.

By Mr. CLARK.—We offer in evidence certificate of the Clerk of the District Court for the Second Judicial Division at Nome, Alaska, showing the license paid by the Northern Commercial Company on boats for the years 1905 and 1906.

By Mr. CROSSLEY.—Objected to as not the best evidence.

By REFEREE.—Statement accepted.

Hearing continued to 22d March, 1912, at 2 o'clock P. M.

On 22d March, 1912, at request of defendant and by consent, hearing continued until March 25th, 1912, at 2 P. M. [44]

On 25th March hearing continued until April 1st, 1912, at 2 P. M., by consent of parties.

On April 1st, 1912, by agreement of counsel, hearing continued to await the arrival in Fairbanks of Volney Richmond, Superintendent of the defendant corporation, and Thomas A. McGowan, one of its attorneys.

On May 8th, 1912, at 2 o'clock P. M. the parties appeared before the referee, Mr. J. K. Brown appearing for plaintiff, and Mr. Thomas A. McGowan appearing for defendant, and the following proceedings were had:

[Testimony.]

[Testimony of Volney Richmond, for Defendant.]

Mr. VOLNEY RICHMOND being first duly sworn by the referee testified as follows:

(By Mr. McGOWAN.)

Q. Mr. Richmond, you are the Superintendent of the Northern Commercial Company? A. I am.

Q. Also the Northern Navigation Company?

A. I am.

Q. An official of both companies? A. I am.

Q. Will you look at this list which was formerly

(Testimony of Volney Richmond.)
submitted to the Referee, and state where that list was prepared?

A. In San Francisco. It was prepared at the home office of the Northern Commercial Company and Northern Navigation Company at San Francisco.

Q. That is the same statement prepared under the supervision of myself last winter? A. It is.

Q. Is it a correct statement as taken from the records? A. It is.

Mr. McGOWAN.—We now offer it in evidence.

By Mr. BROWN.—Q. All the steamers named in this list were operated by your company during the years designated on the statement?

A. They were.

Q. And those opposite the names of which are the words: "Operated to foreign ports" and the ditto characters, were [45] those upon which no license was paid? A. They are.

Q. These are all the boats that your records show were operated by the companies in the years 1905 to 1911, inclusive? A. They are.

Q. The statement of the net tonnage shows the current net tonnage according to the certificates of registration of the respective steamers? A. Yes, sir.

Q. Have you compared this statement with the official list? A. I have not.

Q. You say there were no other steamers than shown on this list operated by the Northern Commercial Company and the Northern Navigation Company between the years 1905 and 1911 in Alaskan

(Testimony of Volney Richmond.)

waters? A. There were not.

Q. And you are satisfied that this is a correct transcript of your books? A. I am.

Q. Especially as to dates and amounts paid for licenses for different steamers? A. Yes, sir.

Mr. McGOWAN.—We offer this as "Defendant's Referee Exhibit No. 1."

(Statement admitted and so marked by referee.)

The following is Defendant's Referee Exhibit No. 1: [45a]

[Defendant's Referee's Exhibit No. 1—Record of Northern Navigation Steamers Operated and Tonnage Licenses Paid.]

RECORD OF NORTHERN NAVIGATION STEAMERS OPERATED AND TONNAGE LICENSES PAID.

Season.	Steamer.	Register Number.	Net Tonnage.	License At.	Date.	Taken. Expiring.	Amount Paid.	Remarks.
1905	Herman	96398	164	Nome	Jul. 22 '05	May 31 '06	164.00	
	Ida May	111182	267	"	Oct. 16 '05	June 28 '06	267.00	
	Delta	202463	237	"	Jul. 22 '05	Jul. 18 '06	237.00	
	D. R. Campbell	157509	409	"	Oct. 16 '05	Sept. 7 '06	409.00	
	Margaret	92890	260	"	Jul. 22 '05	May 31 '06	260.00	
	Isabelle	100779	76	"	Jul. 22 '05	May 31 '06	76.00	
	Sarah	116856	588					Operated to foreign ports
	Susie	116855	588					-do-
	Louise	141572	384					"
	Rock Island	111177	267					"
	Seattle No. 3	116854	326					"
	Leah	141556	295					"
	Tanana	201297	372					"
1906	Herman	96398	164	Nome	July 2 '06	May 31 '07	164.00	
	Ida May	111182	267	"	July 2 '06	May 31 '07	267.00	
	Delta	202463	237	Fairbanks	Jul. 12 '06	Jul. 18 '07	237.00	
	D. R. Campbell	157509	409	Nome	Sep. 15 '06	Sept. 7 '07	409.00	
	Margaret	92890	260	Fairbanks	Jul. 12 '06	Jun. 1 '07	260.00	
	Isabelle	100779	76	"	Jul. 12 '06	Jun. 1 '07	76.00	
	Louise	141572	384	Nome	Jul. 2 '06	Jun. 30 '07	384.00	
	Leah	141556	295	"	Oct. 10 '06	May 31 '07	295.00	
	Koyukuk	203496	149	"	Octr. 5 '06	Jul. 28 '07	149.00	
	Sarah	116856	588					Operated to foreign ports
	Hannah	96428	588					-do-
	Lavelle Young	141529	396					"
	Tanana	201297	372					"
	Seattle No. 3	116854	326					"

RECORD OF NORTHERN NAVIGATION STEAMERS OPERATED AND TONNAGE LICENSES PAID.

Season.	Steamer.	Register Number.	Net Tonnage.	License At.	Date.	Taken. Expiring.	Amount Paid.	Remarks.
1907	Herman	96398	164	Nome	July 8 '07	Jun. 16 '08	164.00	
	Ida May	111182	267	"	July 8 '07	July 4 '08	267.00	
	Delta	202463	237	Fairbanks	Jul. 16 '07	Jul. 18 '08	237.00	
	D. R. Campbell	157509	409	Nome	July 8 '07	Jun. 21 '08	409.00	
	Margaret	92890	260	Fairbanks	Jul. 16 '07	June 1 '08	260.00	
	Isabelle	1007779	76	"	June 8 '07	June 1 '08	76.00	
	Louise	141572	384	Nome	Sep. 23 '07	Augt. 2 '08	384.00	
	Koyukuk	203496	149	Fairbanks	Jul. 16 '07	Jul. 27 '08	153.00	
	St. Michael	116816	409	Nome	July 8 '07	May 31 '08	409.00	
	Reliance	204486	171	"	Sep. 23 '07	Jul. 29 '08	171.00	
	Tanana	201297	372	Fairbanks	Jun. 20 '07	May 16 '08	372.00	
	Sarah	116856	588					Operated to foreign ports
	Hannah	96428	588					–do–
	Lavelle Young	141529	396					"
	Seattle No. 3	116854	326					"
	Schwatka	116812	291					"
[46]								
1908	Herman	96398	164	Nome	Jul. 17 '08	Jun. 16 '09	164.00	
	Delta	202463	237	Fairbanks	" 23 '08	Jul. 18 '09	237.00	
	Louise	141572	384	Nome	Sept. 1 '08	Augt. 2 '09	384.00	
	Koyukuk	203496	149	Fairbanks	Jul. 27 '08	Jul. 27 '09	153.00	
	Reliance	204486	171	"	Augt. 3 '08	Jul. 30 '09	171.00	
	Seattle No. 3	116854	326	Nome	Jul. 17 '08	Jun. 25 '09	326.00	
	Susie	116855	588					Operated to foreign ports
	D. R. Campbell	157509	409					–do–
	Tanana	201297	372					"
	Lavelle Young	141529	141					"
	Schwatka	116812	291					" Operated Jun. 23
	Sarah	116856m	588					" to Aug. 25.
	Hannah	96428	588					" Operated Aug. 26 to Sept. 23.

RECORD OF NORTHERN NAVIGATION STEAMERS OPERATED AND TONNAGE LICENSES PAID.

Season.	Steamer.	Register Number.	Net Tonnage.	License At.	Date.	Taken. Expiring.	Amount Paid.	Remarks.
1909	Herman	96398	164	Nome	Jul. 24 '09	Jun. 22 '10	164.00	
	Louise	141572	384	"	Sept. 25 '09	Augt. 3 '10	384.00	
	Seattle No. 3	116854	326	"	Jul. 24 '09	July 7 '10	326.00	
	St. Michael	116816	409	"	Jul. 24 '09	Jun. 21 '10	409.00	
	Koyukuk	203496	149	Fairbanks	Jul. 28 '09	Jul. 27 '10	153.00	
	Susie	116855	588					Operated to foreign ports
	Hannah	96428	588					–do–
	D. R. Campbell	157509	409					"
	Delta	202468	237					"
	Schwatka	116812	291					"
	Delta	202463	237					"
	Reliance	204486	171					"
1910	Herman	96398	164	Nome	Jul. 25 '10	Jun. 22 '11	164.00	
	D. R. Campbell	157509	409	"	Jul. 25 "10	Jun. 21 '11	409.00	
	Seattle No. 3	116854	326	Fairbanks	Jun. 28 '10	May 24 '11	326.00	
	Tanana	201297	372	"	Jun. 28 '10	May 24 '11	372.00	
	Koyukuk	203496	149	"	Jun. 28 '10	Jul. 27 '11	153.00	
	Lavelle Young	141529	396	Nome	Jul. 25 '10	July 8 '11	396.00	
	Leota	141541	24	"	Jul. 25 '10	June 19 '11	24.00	
	Delta	202463	237	Fairbanks	Jun. 28 '10	May 24 '11	237.00	
	Louise	141572	384					Operated Jun. 15 to Aug. 1 '10, 1909 License operative to Aug. 3 '10
	Sarah	116856	588					Operated to foreign ports.
	Susie	116855	588					–do–
	St. Michael	116816	409					"
	Reliance	204486	171					"
	Schwatka	116812	291					"

RECORD OF NORTHERN NAVIGATION STEAMERS OPERATED AND TONNAGE LICENSES PAID.

Season.	Steamer.	Register Number.	Net Tonnage.	License At.	Date.	Taken. Expiring.	Amount Paid.	Remarks.
1911	Herman	96398	164	Nome	Jul. 17 '11	Jun. 22 '12	164.00	
	Seattle No. 3	116854	326	"	Jul. 17 '11	Jun. 18 '12	326.00	
	Tanana	201297	372	Fairbanks	June 5 '11	May 24 '12	372.00	
	Lavelle Young	141529	396	"	Aug. 12 '11	July 8 '12	396.00	
	Delta	202463	237	"	June 5 '11	May 24 '12	237.00	
	Louise	141572	384	Nome	Jul. 17 '11	Jun. 27 '12	384.00	
	Reliance	204486	171	Fairbanks	June 5 '11	May 31 '12	171.00	
	Wilbur Crimmin	81606	159	Nome	Jul 17 '11	Jul. 31 '12	59.00	
	Alice	206095	145	Fairbanks	Aug. 12 '11	Jun. 12 '12	145.00	
	Klondyke	161114	242	Nome	Jul. 17 '11	Jun. 14 '12	242.00	
	Meteor	93031	40	"	Augt. 3 '11	Jun. 14 '12	40.00	
	Sarah	116856	588					
	Susie	116855	588					Operated to foreign ports
	St. Michael	116816	409					"
	Schwatka	116812	291					"

San Francisco
February 16, 1912.

Mr. McGOWAN.—I produce at this time and offer in evidence Certificate of the Clerk of the District Court for the Fourth Division of the Territory of Alaska, showing the payments made by the companies for licenses on the boats shown on this list, this for the purpose of letting the Government and the Referee check if they so desire.

Statement admitted and marked Defendant's Referee's Exhibit No. 2. [49]

[Defendant's Referee's Exhibit No. 2—List of Licenses.]

LIST OF LICENSES ISSUED FOR STEAMERS REGISTERED IN ALASKA, PLYING IN ALASKA WATERS, BASED UPON THE NET TONNAGE, CUSTOM HOUSE MEASUREMENT OF EACH VESSEL.

Date Paid:	Steamer:	Tonnage:	License begins:	Amount:
	ISSUED TO NORTHERN COMMERICIAL CO.			
July 14, 1906.	"Margaret"	260	June 1, 1906.	$260.00
July 14, 1906.	"Delta"	237	July 19, 1906.	237.00
July 14, 1906.	"Isabelle"	76	June 1, 1906.	76.00
	ISSUED TO NORTHERN NAVIGATION CO.			
June 8, 1907.	"Isabelle"	76	June 1, 1907.	76.00
June 20, 1907.	"Tanana"	372	May 18, 1907.	372.00
July 27, 1908.	"Delta"	237	July 18, 1908.	237.00
July 27, 1908.	"Koyukuk"	153	July 28, 1908.	153.00
Aug. 5, 1908.	"Reliance"	171	July 30, 1908.	171.00
Sep. 29, 1909.	"Koyukuk"	153.	July 28, 1909.	153.00
June 27, 1910.	"Delta"	237.	May 25, 1910.	237.00
June 27, 1910.	"Tanana"	372.	May 25, 1910.	372.00
June 27, 1910.	"Seattle #3"	326.	May 25, 1910.	326.00
July 28, 1910.	"Koyukuk"	153	July 28, 1910.	153.00
June 5, 1911.	"Delta"	237	May 25, 1911.	237.00
June 5, 1911.	"Tanana"	372	May 25, 1911.	372.00
June 5, 1911.	"Reliance"	171	June 1, 1911.	171.00
Aug. 10, 1911.	"Lavelle Young"	396	July 9, 1911.	396.00
Aug. 10, 1911.	"Alice"	145	July 15, 1911.	145.00
July 16, 1907.	"Margaret"	260	July 22, 1907.	260.00
July 16, 1907.	"Delta"	237	July 22, 1907.	237.00
July 16, 1907.	"Koyukuk"	153	July 22, 1907.	153.00

[50]

United States of America,
Territory of Alaska,
Fourth Division,—ss.

I, C. C. Page, Clerk of the District Court, Territory of Alaska, Fourth Division, do hereby certify that the foregoing is a full, true and correct list of all Licenses issued to The Northern Commercial Company and the Northern Navigation Company, for the tonnage of certain steamers named therein and plying in Alaska waters, from April 1, 1905, to March 18, 1912, together with the date that each license began and the amounts paid thereon, as same appears from the records in my office.

IN WITNESS WHEREOF I have hereunto set my hand and affixed the seal of said Court, at Fairbanks, Alaska, this 18th day of March, 1912.

[Seal] C. C. PAGE,
Clerk of District Court, Territory of Alaska, Fourth Division. [51]

Mr. McGOWAN.—I now hand you certificate of the Clerk of the Court at Nome, Alaska, which shows payments made on the boats in question as license fees during the years in controversy.

Certificate admitted by referee and marked "Defendant's Referee's Exhibit No. 3." [52]

[Defendant's Referee's Exhibit No. 3—License Fees Paid on Steamers by the Northern Commercial Co. During the Years 1905 to 1911, Inclusive.]

LICENSE FEES PAID ON STEAMERS BY THE NORTHERN COMMERCIAL COMPANY DURING THE YEARS 1905 TO 1911 INCLUSIVE.

Name of Steamer.	Period of License. From.	To.	Amount Paid.
Herman	June 1, 1905	May 31, 1906	$164.00
Margaret	June 1, 1905	May 31, 1906	260.00
Delta	July 18, 1905	July 17, 1906	237.00
Isabel	June 1, 1905	May 31, 1906	76.00
Ida May	June 29, 1905	June 28, 1906	267.00
D. R. Campbell	Sept. 8, 1905	Sept. 7, 1906	409.00
Louise	June 1, 1906	May 31, 1907	384.00
Ida May	June 29, 1906	June 28, 1907	267.00
Herman	June 1, 1906	May 31, 1907	164.00
D. R. Campbell	Sept. 8, 1906	Sept. 7, 1907	409.00
Koyukuk	July 29, 1906	July 28, 1907	149.00
Leah	June 1, 1906	May 31, 1907	295.00
St. Michael	June 1, 1907	May 31, 1908	409.00
Herman	June 17, 1907	June 16, 1908	164.00
D. R. Campbell	June 22, 1907	June 21, 1908	409.00
Ida May	July 5, 1907	July 4, 1908	267.00

United States of America,
District of Alaska,
Second Division,—ss.

I, John Sundback, Clerk of the District Court for the District of Alaska, Second Division, do hereby certify that I have compared the foregoing with the License Register of this office, and find that the same is a true and correct copy of the entries in said License Register covering payments made by the Northern Commercial Company during the period stated.

Witness my hand and the seal of said Court this 18th day of March, A. D. 1912.

[Seal] J. SUNDBACK,
Clerk. [53]

LICENSE FEES PAID ON STEAMERS BY THE NORTHERN NAVIGATION COMPANY DURING THE YEARS 1905 TO 1911 INCLUSIVE.

Name of Steamer.	Period of License. From.	To.	Amount. Paid.
Reliance	July 30, 1907	July 29, 1908	$171.00
Louise	Aug. 3, 1907	Aug. 2, 1908	384.00
Herman	June 17, 1908	June 16, 1909	164.00
Seattle No. 3	June 26, 1908	June 25, 1909	326.00
Louise	Aug. 3, 1908	Aug. 2, 1909	384.00
Herman	June 23, 1909	June 22, 1910	164.00
St. Michael	June 22, 1909	June 21, 1910	409.00
Seattle No. 3	July 8, 1909	July 7, 1910	326.00
Louise	Aug. 3, 1909	Aug. 2, 1910	384.00
Herman	June 23, 1910	June 22, 1911	164.00
D. R. Campbell	June 22, 1910	June 21, 1911	409.00
Lavelle Young	July 9, 1910	July 8, 1911	396.00
Leotta	June 10, 1910	June 9, 1911	24.00
Louise	June 28, 1911	June 27, 1912	384.00
Herman	June 23, 1911	June 22, 1912	164.00
Seattle No. 3	June 19, 1911	June 18, 1912	326.00
Wilbur Crimmin	Aug. 1, 1911	July 31, 1912	59.00
Klondyke	June 15, 1911	June 14, 1912	242.00
Meteor	June 15, 1911	June 14, 1912	40.00

United States of America,
District of Alaska,
Second Division,—ss.

I, John Sundback, Clerk of the District Court for the District of Alaska, Second Division, do hereby certify that I have compared the foregoing with the License Register of this office, and find that the same is a true and correct copy of the entries in said License Register covering payment made by the

(Testimony of Volney Richmond.)
Northern Navigation Company during the period stated.

Witness my hand and the seal of said Court this 18th day of March, A. D. 1912.

[Seal] J. SUNDBACK,
Clerk. [54]

Mr. McGOWAN.—Q. Mr. Richmond, the company has made all these payments for licenses as shown by Certificates of the Clerks of Court, marked Defendants' Referee's Exhibit Nos. 2 and 3?

A. They have.

Mr. McGOWAN.—Referring to Defendants' Referee's Exhibit No. 1, we admit for the purpose of this case that neither the Northern Commercial Company or the Northern Navigation Company paid license fees on the steamers marked "Operated to foreign ports" during the years 1905, 1906, 1907, 1908, 1909, 1910 and 1911.

(By Mr. McGOWAN.)

Q. Mr. Richmond, will you kindly look at Defendants' Referee's Exhibit No. 1 at the boats marked "Operated to foreign ports," and state as to whether or not those boats were operated as shown in that list during the respective years?

A. The boats shown were operated to foreign ports as listed in this exhibit.

Q. What foreign port or ports did the boats run to?

A. To Dawson, Yukon Territory, Canada.

Q. Then I take it from your testimony that in the year 1905 the steamers "Sarah," net tonnage 588,

(Testimony of Volney Richmond.)

"Susie," net tonnage 588, "Louise," net tonnage 384, "Rock Island," net tonnage 267, "Seattle No. 3," net tonnage 326, "Leah," net tonnage 295, and "Tanana," net tonnage 372, were operated on the Yukon River in both Alaska and Canada.

A. They were.

Q. Now, then, the same question as to the steamers "Sarah," net tonnage 588, "Hannah," net tonnage 588, "Lavelle Young," net tonnage 396, "Tanana," net tonnage 372 and "Seattle No. 3," net tonnage 326, [55] were operated on the Yukon River in both Alaska and the Yukon Territory, Canada, during the year 1906.

By Mr. BROWN.—Objected to on the ground that it is immaterial and also to the previous question, that under the law it makes no difference whether they were so operated or not as long as they were operated in American waters in Alaska.

A. They were.

Q. Now, for the year 1907, the steamers "Sarah," net tonnage 588, "Hannah," net tonnage 588, "Lavelle Young," net tonnage 396, "Seattle No. 3," net tonnage 326 and "Schwatka," net tonnage 291, where were they operated during the year 1907?

Mr. BROWN.—Same objection.

A. On the Yukon River in the United States and Canada.

Q. In the year 1908, as to the steamers "Susie," net tonnage 588, "D. R. Campbell," net tonnage 409, "Tanana," net tonnage 372, "Lavelle Young," net tonnage 396, "Schwatka," net tonnage 291, "Sarah,"

(Testimony of Volney Richmond.)
net tonnage 588, and "Hannah," net tonnage 588, where were they operated?

Mr. BROWN.—Same objection.

A. On the Yukon River in Alaska and Yukon Territory.

Q. In the year 1909, as to steamers "Susie," net tonnage 588, "Hannah," net tonnage 588, "D. R. Campbell," net tonnage 409, "Tanana," net tonnage 372, "Schwatka," net tonnage 291, "Delta," net tonnage 237 and "Reliance," net tonnage 171, where were they operated?

Mr. BROWN.—Same objection.

A. On the Yukon River in Alaska and Yukon Territory, Canada.

Q. In the year 1910, the Steamers "Louise," net tonnage 384, "Sarah," net tonnage 588, "Susie," net tonnage 588, "St. Michaels," net tonnage 409, "Reliance," net tonnage 171 and "Schwatka," net tonnage 291, where were they operated?

Mr. BROWN.—Same objection.

A. On the Yukon River in the Territory of Alaska and Yukon Territory, Canada. [56]

Q. In 1911, steamers "Sarah," net tonnage 588, "Susie," net tonnage 588, "St. Michael," net tonnage 409, and "Schwatka," net tonnage 291, where were they operated?

Mr. BROWN.—Same objection.

A. On the Yukon River in the United States and Canada.

Q. I hand you Defendant's Exhibit No. 2 as offered at the trial of this action before Judges Over-

(Testimony of Volney Richmond.)

field and Cushman and admitted in evidence on August 19th, 1911, and ask you, Mr. Richmond, if all of the boats that you have just testified to as having been operated foreign, were operated to the port of Dawson, Yukon Territory, Canada, as shown by the Exhibit which I have just handed you.

Mr. BROWN.—We object to that on the ground that the evidence sought to be elicited from the witness to the question is immaterial, for the reason that the document the witness is questioned about purports to show the payment of license tax or tonnage tax in the Dominion of Canada, and it is immaterial whether any such tax was paid, the ships in question being American vessels and subject to the payment of license tax provided by the Code of Alaska notwithstanding the payment of tonnage tax in the Dominion of Canada or any other foreign country.

A. They were.

Q. And were subject to the same laws and same tax?

Mr. BROWN.—Objected to on the same ground.

A. They were.

Mr. BROWN.—The Government does not object to the admission of the receipts or documents shown to the witness on the ground that they are not the best evidence, nor on the ground that they are incompetent to prove the matters desired, but on the ground heretofore stated, that the payment of a tonnage [57] tax in Canada or any other foreign country does not exempt owners of vessels from the payment of license tax for the Territory of Alaska.

(Testimony of Volney Richmond.)

Mr. McGOWAN.—Offering your objection to materiality, you admit that these payments were made?

Mr. BROWN.—For the purpose of the case, the Government admits that the payments were made, but denies that the fact they were made is material to the issues in this case.

Mr. McGOWAN.—And this admission is to go to all the boats operated foreign?

Mr. BROWN.—Yes.

Mr. McGOWAN.—Q. Mr. Richmond, is it not a fact that during the years 1905 and 1906 the steamers as shown in this list were operated by the Northern Commercial Company?

A. Yes, sir.

Q. And after the year 1906 and during the years 1907, 1908, 1909, 1910 and 1911, who operated all the steamers as shown on Defendants' Referee's Exhibit No. 1? A. The Northern Navigation Company.

Q. How did that come about?

A. Through the Northern Navigation Company operating the steamers themselves. Previous to that time they had been operated by the Northern Commercial Company.

Q. The Northern Navigation Company originally owned all these steamers, and chartered them to the Northern Commercial Company for the years 1905 and 1906? A. They did, with possibly one exception.

Q. What was that?

A. The steamer "Tanana."

(Testimony of Volney Richmond.)

Q. And since 1907 and to 1911, inclusive, the Northern Navigation Company has been operating the steamers in its own behalf? A. It has.

Q. And separate from the Northern Commercial Company? [58] A. It has.

Mr. BROWN.—I will state to the Referee that the Government, in view of the testimony of the witness now on the stand, Mr. Volney Richmond, intends to move the Court for an order joining the Northern Navigation Company, a corporation, as a codefendant with the Northern Commercial Company, in order that the whole of the license tax may be settled in one suit thus saving a multiplicity of suits.

Mr. McGOWAN.—We will attend before the Court and consent to an order that the Northern Navigation Company be made a party to this action.

Mr. BROWN.—No cross-examination.

[Testimony of Thomas A. McGowan, for Defendant.]

THOMAS A. McGOWAN, being first duly sworn, testified as follows (it being consented that Mr. McGowan make a statement without going through the form of questions and answers):

Mr. McGOWAN.—Defendants' Referee Exhibit No. 1 was made at our home office in San Francisco under my supervision and is a correct statement from the records kept at that place. Referring to the year 1908, it appears that three of our boats, known as the Packets, namely: the "Susie," "Sarah" and "Hannah," were operated during the one season. It was customary at that time to operate but two of those boats and three of them were

(Testimony of Thomas A. McGowan.)

operated during that season for this reason. Some time in August the steamer "Sarah" was disabled and was compelled to go on the ways for repairs, and on or about August 25th, which was about six weeks before the close of the open season of navigation, the steamer "Hannah" was put on to replace her, making one round trip from St. Michaels to Dawson between August 26th and September 23d, and it is our contention that **[59]** the license for the steamer "Sarah" should be transferred so as to cover this last trip of the steamer "Hannah" under the circumstances just given.

Mr. BROWN.—Counsel for the Government moves to strike out the statement of Mr. McGowan in his testimony that the steamer "Hannah" was operated for one trip in place of the steamer "Sarah," for the reason that it is immaterial, has no bearing upon any of the issues in this case and that the payment of the license tax for the steamer "Sarah" did not exempt the steamer "Hannah" from a similar license tax provided she was operated at all in Alaska waters during the year 1908.

Mr. BROWN.—No cross-examination.

Redirect Examination.

Mr. McGOWAN.—The steamer "Sarah" was operated foreign during the year 1908 and when the steamer "Hannah" was put in commission to replace her she was also operated foreign, as appears by the list of steamers for the year 1908 in Defendants' Referee's Exhibit No. 1.

Mr. BROWN.—Counsel for the Government

(Testimony of Thomas A. McGowan.)

makes the same motion to strike as the last above motion, and makes the motion to strike instead of having objected to the testimony before it was given, for the reason that the testimony was given in narrative form without question and there was no opportunity to make the objection before the witness testified. One more question I would like to ask Mr. Richmond—whether the boats named in this Exhibit No. 1 are all the boats that were operated on Alaskan waters during the years 1905 to 1911 inclusive?

A. They are the entire list of boats operated by the Northern Commercial Company and the Northern Navigation Company.

Mr. McGOWAN.—Mr. Brown, I have here the 42nd Annual List of Merchant **[60]** Vessels of the United States, issued by the Department of Commerce and Labor, Bureau of Navigation, with official numbers and signal letters, for the year 1910, which shows the net tonnage of all the boats in question upon which license fees have not been paid. I understand they have already been checked by the Referee and he finds that they agree with our Exhibit No. 1. Can it be consented that our list agrees with this official record and that we need not offer it in evidence?

Mr. BROWN.—Counsel for the Government agrees that the net tonnage of the different vessels operated by the Northern Navigation Company and the Northern Commercial Company during the years 1905 to 1911, inclusive, as shown by the book just

referred to by Mr. McGowan, agrees with the statement of the net tonnage of the same vessels as shown by Defendants' Referee's Exhibit No. 1.

(Matter continued until 2 o'clock May 9th, 1912, for the purpose of procuring an order of the court making Northern Navigation Company a party.)

The above matter coming on for hearing on this 9th day of May, 1912, at 2 o'clock P. M. Mr. Thos. A. McGowan appears and files copy of order of the Court adding Northern Navigation Company as party defendant. **[61]**

That the testimony was then closed and the matter submitted to said Referee for his findings and decision, and thereafter and on or about the 15th day of May, 1912, said Referee, in pursuance of said order of Court heretofore referred to, submitted to the above-entitled court his Report and Findings, which was as follows, to wit: **[62]**

[Title of Court and Cause.]

Report of Referee.

To the Hon. PETER D. OVERFIELD, Judge of the District Court for the Territory of Alaska, Fourth Division.

Pursuant to the order of this Court in this action, made on the 24th day of August, 1911, by Peter D. Overfield and Edward E. Cushman, District Judges, appointing the undersigned, Guy B. Erwin, Referee, to hear proofs and take testimony as to any and all matters and things involving or respecting the amount of License Tax due by defendants to the United States of America, on the net tonnage, cus-

tom house measurement, of each of its freight and passenger steamships registered in the District of Alaska and propelled by mechanical power for the years 1905, 1906, 1907, 1908, 1909, 1910, and 1911, inclusive, at the rate of One Dollar ($1.00) per ton, I, the undersigned Referee, beg leave to report as follows:

I.

That I have been attended by attorneys for the respective parties, the United States of America appearing by J. J. Crossley, U. S. District Attorney, and John K. Brown, Asst. U. S. District Attorney, and the defendant appearing by its attorneys, Messrs. McGowan and Clark, and I proceeded to a hearing of the matter so referred. **[63]**

II.

I further report that on such hearing Defendant's Referee Exhibits Nos. 1, 2 and 3, being respectively, Record of Northern Navigation Company Steamers operated and tonnage license paid; Certificates of the Clerk of Court, 4th Division, showing list of licenses issued to Northern Commercial Company and Northern Navigation Company for steamers plying in Alaska waters from April 1st, 1905 to March 18th, 1912; and, Certificates of Clerk of Court, Second Division, showing license fees paid on steamers by Northern Commercial Company during the years 1905 to 1911, inclusive, were offered by defendant's attorneys, accepted by me and filed, and that Mr. Volney Richmond and Mr. Thomas A. McGowan, witnesses produced by the defendants, were duly sworn by me and gave their testimony in said matter,

and a transcript of such testimony, together with a report of all proceedings had before me, and said exhibits, are herewith filed with the Clerk of said court as a part of this report.

That after a full examination and consideration of said matter I find as follows:

III.

That both the Northern Commercial Company and the Northern Navigation Company have procured the Licenses required by Section 460 of the Code of Civil Procedure of the Territory of Alaska for each and every one of the registered steamers owned by said companies and operated wholly within the waters of the Territory of Alaska during the years 1905 to 1911, inclusive.

IV.

That neither the Northern Commercial Company nor the Northern Navigation Company have procured the licenses required by said Section 460 of the Code of Civil Procedure of the Territory of Alaska for any of its steamers operated foreign during the years 1905 to 1911, inclusive. **[64]**

V.

That the Northern Commercial Company and the Northern Navigation Company are liable to pay to the United States a license tax of one dollar per ton per annum on the net tonnage, custom house measurement, of each of its freight and passenger steamers registered in the Territory of Alaska operated foreign, i. e., on the Yukon River and its tributaries, both in the Territory of Alaska and Yukon Territory, Dominion of Canada, for the years 1905 to 1911, inclusive.

VI.

That with respect to the Northern Commercial Company, I find as follows:

(1) For the year 1905 that the Northern Commercial Company failed to take out a license for the steamer "Sarah," net tonnage 588.

(2) For the year 1905 that the Northern Commercial Company failed to take out a license for the steamer "Susie," net tonnage 588.

(3) For the year 1905 that the Northern Commercial Company failed to take out a license for the steamer "Louise," net tonnage 384.

(4) For the year 1905 that the Northern Commercial Company failed to take out a license for the steamer "Rock Island," net tonnage 267.

(5) For the year 1905 that the Northern Commercial Company failed to take out a license for the steamer "Seattle No. 3," net tonnage 326.

(6) For the year 1905 that the Northern Commercial Company failed to take out a license for the steamer "Leah," net tonnage 295.

(7) For the year 1905 the Northern Commercial Company failed to take out a license for the steamer "Tanana," net tonnage 372. **[65]**

(8) For the year 1906 that the Northern Commercial Company failed to take out a license for the steamer "Sarah," net tonnage 588.

(9) For the year 1906 that the Northern Commercial Company failed to take out a license for the steamer "Hannah," net tonnage 588.

(10) For the year 1906 that the Northern Commercial Company failed to take out a license for the

steamer "Lavelle Young," net tonnage 396.

(11) For the year 1906 that the Northern Commercial Company failed to take out a license for the steamer "Tanana," net tonnage 372.

(12) For the year 1906 that the Northern Commercial Company failed to take out a license for the steamer "Seattle No. 3," net tonnage 326; and that the said Northern Commercial Company is liable to pay to the United States as license tax on its said steamers for the years 1905 to 1906, inclusive, the total sum of Five Thousand and Ninety Dollars ($5,090.00).

VII.

That with respect to the Northern Navigation Company, I find as follows:

(1) For the year 1907 that the Northern Navigation Company failed to take out a license for the steamer "Sarah," net tonnage 588.

(2) For the year 1907 that the Northern Navigation Company failed to take out a license for the steamer "Hannah," net tonnage 588.

(3) For the year 1907 that the Northern Navigation Company failed to take out a license for the steamer "Lavelle Young," net tonnage 396.

(4) For the year 1907 that the Northern Navigation company failed to take out a license for the steamer "Seattle [66] No. 3," net tonnage 326.

(5) For the year 1907 that the Northern Navigation Company failed to take out a license for the steamer "Schwatka," net tonnage 291.

(6) For the year 1908 that the Northern Navigation Company failed to take out a license for the

steamer "Susie," net tonnage 588.

(7) For the year 1908 that the Northern Navigation Company failed to take out a license for the steamer "D. R. Campbell," net tonnage 409.

(8) For the year 1908 that the Northern Navigation Company failed to take out a license for the steamer "Tanana," net tonnage 372.

(10) For the year 1908 that the Northern Navigation Company failed to take out a license for the steamer "Lavelle Young," net tonnage 396.

(11) For the year 1908 that the Northern Navigation Company failed to take out a license for the steamer "Schwatka," net tonnage 291.

(12) For the year 1908 that the Northern Navigation Company failed to take out a license for the steamer "Sarah," net tonnage 588.

(13) For the year 1908 that the Northern Navigation Company failed to take out a license for the steamer "Hannah," net tonnage 588.

(14) For the year 1909 that the Northern Navigation Company failed to take out a license for the steamer "Susie," net tonnage 588.

(15) For the year 1909 that the Northern Navigation Company failed to take out a license for the steamer "Hannah," net tonnage 588. **[67]**

(16) For the year 1909 that the Northern Navigation Company failed to take out a license for the steamer "D. R. Campbell," net tonnage 409.

(17) For the year 1909 that the Northern Navigation Company failed to take out a license for the steamer "Tanana," net tonnage 372.

(18) For the year 1909 that the Northern Navi-

gation Company failed to take out a license for the steamer "Schwatka," net tonnage 291.

(19) For the year 1909 that the Northern Navigation Company failed to take out a license for the steamer "Delta," net tonnage 237.

(20) For the year 1909 that the Northern Navigation Company failed to take out a license for the steamer "Reliance," net tonnage 171.

(21) For the year 1910 that the Northern Navigation Company failed to take out a license for the steamer "Louise," net tonnage 384.

(22) For the year 1910 that the Northern Navigation Company failed to take out a license for the steamer "Sarah," net tonnage 588.

(23) For the year 1910 that the Northern Navigation Company failed to take out a license for the steamer "Susie," net tonnage 588.

(24) For the year 1910 that the Northern Navigation Company failed to take out a license for the steamer "St. Michael," net tonnage 409.

(25) For the year 1910 that the Northern Navigation Company failed to take out a license for the steamer "Reliance," net tonnage 171.

(26) For the year 1910 that the Northern Navigation Company failed to take out a license for the steamer "Schwatka" net tonnage 291. [68]

(27) For the year 1911 that the Northern Navigation Company failed to take out a license for the steamer "Sarah," net tonnage 588.

(28) For the year 1911 that the Northern Navigation Company failed to take out a license for the steamer "Susie," net tonnage 588.

(29) For the year 1911 that the Northern Navigation Company failed to take out a license for the steamer "St. Michael," net tonnage 409.

(30) For the year 1911 that the Northern Navigation Company failed to take out a license for the steamer "Schwatka," net tonnage 291; and that the said defendant Northern Navigation Company is liable to pay to the United States as license tax on its said steamers operated foreign, for the years 1907 to 1911, inclusive, the total sum of twelve thousand three hundred and eighty-four ($12,384.00).

Dated the 15th day of May, A. D. 1912.

G. B. ERWIN,
Referee.

[Indorsed]: No. 612. (Title of Court and Cause.) Filed in the District Court, Territory of Alaska, 4th Div. May 16, 1912. C. C. Page, Clerk. By H. C. Green, Deputy. [69]

That thereafter and by consent of the attorneys for plaintiff and defendant, the Court made and entered an order, which is in the words and figures as follows, to wit: [70]

[Title of Court and Cause.]

Order [Adding Northern Navigation Co. as a Party Defendant; Amending Original Statement of Facts, etc.].

It appearing, from the testimony produced before Guy B. Erwin, Esquire, the Referee heretofore appointed in the above-entitled cause to take the testimony as to the license fees due on the various steamboats mentioned and operated as shown by the State-

ment of Facts in this action, that, during the years 1905 and 1906, the said boats were operated by the Northern Commercial Company, the above-named defendant, and that thereafter the said boats were operated by the Northern Navigation Company, as the successor of the said Northern Commercial Company; that thereupon John K. Brown, Esquire, Assistant United States District Attorney, representing the plaintiff, moved before said Referee that the said Northern Navigation Company be added as a party defendant to this action, so that all the matters in controversy with reference to the said steamboat taxes might be adjudicated in this action, thereby avoiding a multiplicity of actions; the said Northern Navigation Company, a corporation organized under the laws of the State of New Jersey, being represented at the hearing before said Referee by its Counsel, Thomas A. McGowan, Esquire, and consenting thereto; that thereupon the said Referee adjourned the said proceedings pending the further order of this Court in the Premises; and it appearing to the satisfaction of this Court that said Northern Navigation Company is a necessary party defendant to this proceeding; [71]

Now, therefore, it is ordered that the said Northern Navigation Company, a corporation as aforesaid, be added as a party defendant to this proceeding, and the Clerk of this Court is hereby ordered to insert the name of said Northern Navigation Company in the title of the original Statement of Facts as a party defendant in said proceeding;

It is further ordered that paragraph one on page

one of said original Statement of Facts, be amended as follows:

Strike out the first two words of said paragraph, namely "the defendant," and insert in lieu thereof the words "each of the above named defendants";

And that the following paragraph be added to said Statement of Facts, to wit:

"xlx.—That when these proceedings were instituted the defendant Northern Commercial Company was operating the steamboats herein before mentioned and described, and that, since the commencement of this proceeding, the added defendant Northern Navigation Company took over and acquired the said steamboats from its codefendant, Northern Commercial Company, and has been operating the same. In other words, during a period of time between the year 1905 and the year 1911 the Northern Commercial Company operated said boats, and during another portion of said time the said boats were operated by the Northern Navigation Company."

It is further ordered that said Statement of Facts and Stipulation, as amended as above, need not be engrossed, and that the amendments aforesaid shall be considered as a part thereof, the same as though the Stipulation and Statement had been engrossed setting forth the same. [72]

It is further ordered that all proceedings heretofore had and taken in this action shall apply to and cover the said Northern Navigation Company the same as though it had been an original party to these proceedings, and there shall be reserved to it all

rights, objections and exceptions, heretofore taken by its codefendant the Northern Commercial Company in these proceedings, and that all testimony and evidence introduced and produced at the trial of this action before Judges Overfield and Cushman shall be considered as taken on behalf of the said Northern Navigation Company;

It is further ordered that the testimony heretofore taken before the Referee shall be considered as testimony introduced on behalf of said Northern Navigation Company as well as on behalf of its said codefendant, and the said Referee is hereby authorized and empowered to take such further testimony as may be offered on behalf of said Northern Navigation Company, and report to this court the license fees which he shall find, if any, which are payable by the said Northern Navigation Company, and the license fees, if any, which are payable by the said Northern Commercial Company, as they shall appear from the testimony introduced;

It is further ordered that, in determining this controversy, these proceedings shall be considered as applications by the said Northern Commercial Company and the said Northern Navigation Company respectively for such licenses as each of said Companies should have taken out in connection with the operating of said steamboats, if they were in fact required to take out any licenses, and that, if a judgment be rendered against the said defendants such judgment may be several, that is to say, a judgment against the Northern Commercial Company for the [73] license fees that it shall be required to pay and

a judgment against the Northern Navigation Company for the license fees that it shall be required to pay;

It is further ordered that all rights reserved by the said Original Statement of Facts and Stipulation to the Northern Commercial Company are hereby reserved to the said Northern Navigation Company, including the right to review by appeal or otherwise any judgment that may be given in this court against said defendant;

It is further ordered that the Referee, Guy B. Erwin, Esquire, be and he is hereby given and granted up to and including the 17th day of May, 1912, within which to file his report and recommendations in the above-entitled matter.

Done in open court at Fairbanks, Alaska, this 9th day of May, 1912.

PETER D. OVERFIELD,
District Judge.

Entered in Court Journal No. 11, page 886.

Consented to:

JAMES J. CROSSLEY,
United States District Attorney.

JOHN K. BROWN, Asst.

McGOWAN & CLARK,
Attorneys for Northern Commercial Company and Northern Navigation Company.

[Indorsed]: No. 612. (Title of Court and Cause.) Filed in District Court, Territory of Alaska, 4th Div. May 9th, 1912. C. C. Page, Clerk. By H. C. Green, Deputy. [74]

That thereafter and on or about the 31st day of

May, 1912, defendants herein served and filed its motion to set aside the Report of the Referee, and objections to his findings, which were as follows, to wit: [75]

[Title of Court and Cause.]

Motion to Set Aside Report of Referee.

Now come the above-named defendants, the Northern Commercial Company and the Northern Navigation Company, and move the Court to set aside the report, and the findings of fact and conclusions of law set forth therein, and each and all thereof, made by Guy B. Erwin, the Referee heretofore appointed herein, and object to the adoption thereof, on the following grounds, to wit:

I.

That paragraph V of said report is not sustained by the evidence and is contrary to law, for the following reasons, to wit:

(a) That it appears from the evidence that all of the steamers covered by said paragraph V were operated by one of the defendants on the waters of the Yukon River, between ports in the Territory of Alaska and the Port of Dawson in the Yukon Territory, Dominion of Canada, the latter being foreign waters and waters elsewhere than in Alaska, and that each and all of said steamers were required to, and did, pay a license or tax in the Yukon Territory, Dominion of Canada.

II.

That the defendant, the Northern Commercial Company, objects to paragraph VI of said Referee's

report, and each and all of the findings therein set forth, and moves that the same [76] be set aside and stricken out, for the reason that the findings numbered 1 to 12 inclusive, and each and all of them, set forth in said paragraph VI, are contrary to law, in this that the steamer mentioned in each of said separate findings was operated by the said defendant beyond the Territory of Alaska, that is to say, on the waters of the Yukon River within the Yukon Territory of the Dominion of Canada, and each and all of them were required to, and did, pay a license or tax in the said Yukon Territory of the Dominion of Canada; and that therefore the said defendant is not liable to pay to the United States a license tax on its said steamers, as found in finding 12 of said paragraph VI.

III.

That finding 12 of said paragraph VI is contrary to the evidence and the law, for the reason that the said Company is not liable to pay to the United States the sum of $5,090.00, or any other sum, as license tax on its said steamers for the years 1905–1906 inclusive, as all of the steamers covered by said finding were operated in foreign waters and were required to, and did, pay a license or tonnage tax in the Dominion of Canada.

IV.

That the defendant, the Northern Commercial Company, now moves this Court that the entire findings as set forth in said paragraph VI of said report, be set aside, for the reason that said findings and all thereof are contrary to the evidence and the law.

V.

That the defendant, the Northern Navigation Company, objects to paragraph VII of said Referee's report, and each and all of the findings, numbered 1 to 30, inclusive, therein set forth, and moves that the same be set aside and stricken out, [77] for the reason that said findings, and each and all of them, are contrary to law, in this that the steamer mentioned in each of said separate findings was operated by the said defendant beyond the Territory of Alaska, that is to say, on the waters of the Yukon River, within the Yukon Territory of the Dominion of Canada, and each and all of them were required to, and did, pay a license or tax in the said Yukon Territory of the Dominion of Canada; and that therefore the said defendant is not liable to pay to the United States a license tax on its said steamers, as found in finding 30 of said paragraph VII.

VI.

That the defendant, the Northern Navigation Company, especially excepts to finding 13 contained in said paragraph VII, referring to the steamer "Hannah," on the ground that the same is contrary to the evidence, in this, that it appears from the uncontradicted evidence that the steamer "Hannah" was operated for only one trip during the season of 1908, and was operated solely for the purpose of making a trip for the steamer "Sarah," which had become disabled, and that, if the steamer "Sarah" is liable to pay a license for said year 1908, the said license could be transferred to the steamer "Hannah"; and that, inasmuch as the Referee finds that the steamer

"Sarah" was liable for a license for the year 1908, said license could have been transferred to the steamer "Hannah," and that said defendant, the Northern Navigation Company, if liable at all, would only be liable for one license fee for both of said boats during said season.

VII.

Defendants further object to the report of said Referee, and the whole thereof, excepting the transcript of testimony filed by him, on the ground that the order appointing said Referee did not authorize the Referee to make findings of fact [78] and conclusions of law, but simply provided that the Referee proceed to hear proofs and take testimony and report the same to the Court, so that the Court could find thereon, and defendants do now move to set aside all the findings made by said Referee wherein he finds upon the facts and the law.

VIII.

Defendants except to the whole of paragraph V contained in said Referee's report, on the ground that the same is not authorized by the order of reference in this matter.

IX.

The defendant, the Northern Commercial Company, excepts to the findings numbered 1 to 12, inclusive, contained in paragraph VI of said report, on the ground that the same are not authorized by the order of reference in this matter.

X.

The defendant, the Northern Navigation Company, excepts to the findings numbered 1 to 30, inclusive,

contained in paragraph VII of said report, for the reason that the same are not authorized by the order of reference in this matter.

XI.

The defendants except to each and all of the findings contained in paragraphs VI and VII of said report, on the ground that the same are contrary to the evidence given before the Court and the Referee in this proceeding, in this that it appears that all of the steamers mentioned in said findings were operated elsewhere than in Alaskan waters, to wit, in the waters of the Yukon Territory of the Dominion of Canada, and that said steamers, and each and all of them, were required, under the laws of the Dominion of Canada, to pay, and did pay, license or tonnage taxes in said Dominion of Canada, and elsewhere than in the Territory of Alaska. [79]

XII.

The defendants except to each and all of the findings contained in paragraphs VI and VII of said report, on the ground that the same are contrary to law, in that all of said steamers mentioned in said findings were operated beyond the waters of Alaska and in the waters of the Dominion of Canada, where they were required to, and did, pay license or tonnage taxes, and therefore were not liable to pay tonnage taxes within the territory of the United States.

XIII.

The defendants do now except to each and all of the findings contained in paragraphs V, VI, and VII, of said report.

XIV.

The defendants do now move that all parts of the

report of said Referee finding on facts and establishing conclusions of law be set aside and stricken out, and that the Court consider only that part of said Referee's report wherein he sets forth the testimony as taken before him.

Dated at Fairbanks, Alaska, this thirty-first day of May, A. D. one thousand nine hundred twelve.

McGOWAN & CLARK,
Attorneys for Defendant. [80]

Service of the within motion to set aside report of Referee and receipt of a copy acknowledged this 31st day of May, 1912.

JAMES J. CROSSLEY,
United States District Attorney,
Attorney for Plaintiff.

[Indorsed]: No. 612. Filed in the District Court, Territory of Alaska, 4th Div. May 31st, 1912. C. C. Page, Clerk. By H. C. Green, Deputy.

That thereafter the United States District Attorney, representing the plaintiff, filed his motion to confirm the Referee's Report and for judgment thereon, which said motion was as follows, to wit: [81]

[Title of Court and Cause.]

Motion to Confirm Referee's Report and for Judgment Thereon.

Now comes the above-named plaintiff, by James J. Crossley, Esq., United States Attorney for the Fourth Judicial Division of the Territory of Alaska, and John K. Brown, Esq., Assistant United States Attorney, and moves this Honorable Court that the report of the Referee, Guy B. Erwin, Esq., filed

herein on the 16th day of May, 1912, be in all respects confirmed and that judgment be entered upon said report of the Referee in favor of the above-named plaintiff and against the above-named defendants and each of them in the amounts found by said Referee in his said report to be due from the said defendants respectively to the said plaintiff, for license tax on the net tonnage, custom-house measurement, of each of the freight and passenger steamships registered in the District of Alaska and propelled by mechanical power, for the years 1905 to 1911, inclusive, which said steamships are named in the said Referee's report.

This motion is based upon the said report of the said Referee and all the records, proceedings and files in the above-entitled action.

JAMES J. CROSSLEY,
United States Attorney.
JOHN K. BROWN,
Assistant United States Attorney. [82]

[Indorsed]: No. 612. (Title of Court and Cause.) Filed in District Court, Territory of Alaska, 4th Div. June 1st, 1912. C. C. Page, Clerk. By H. C. Green, Deputy. [83]

That thereafter and on the 1st day of June, 1912, the motion of the plaintiff to confirm the Referee's Report and for judgment thereon came on regularly for hearing before the Honorable Peter D. Overfield, United States Attorney James J. Crossley and Assistant United States Attorney John Knox Brown appeared for and on behalf of the Government, and Thomas A. McGowan, Esq., counsel for the defend-

ants, appeared for the defendants, and the following proceedings were had, to wit: [84]

[Title of Court and Cause.]

Transcript of Proceedings on Hearing of Motion to Set Aside Report of Referee.

Now, at this time, to wit, the 1st day of June, 1912, the above-entitled matter coming on to be heard before the Honorable Peter D. Overfield, U. S. District Attorney James J. Crossley and Assistant U. S. District Attorney John Knox Brown appearing on behalf of the Government, and Thomas A. McGowan, Esq., of counsel for defendants, appearing on behalf of the defendants, the following proceedings were had, to wit: [85]

Mr. McGOWAN.—I take it from the prior orders in the case, may the Court please—the orders rendered by Judge Cushman and yourself, that at this time we should consider this as a resumed trial from the last hearing. The matters were referred to a Referee for the purpose of taking the evidence, and after the evidence had been taken the trial was to be resumed under the order made at that time, before either yourself or Judge Cushman. And so as to have the record clear, I suggest at this time—and presume it is understood—that this is a continuation of the trial.

Mr. BROWN.—We submit the case on the evidence already introduced.

Mr. McGOWAN.—Now, if the Court please, we will take up the first action, 612.

Mr. BROWN.—Do you also submit it on the evidence?

Mr. McGOWAN.—I am coming to that now. We are taking up 612, United States against Northern Commercial Company and Northern Navigation Company. In addition to the evidence taken before the Referee, I presume you agree that all of the steamboats mentioned in the report of the Referee are stern-wheel river steamboats; and that there are no waters adjacent to the rivers of Alaska excepting foreign waters?

Mr. BROWN.—No, I don't know that that is so.

Mr. McGOWAN.—Well, that is the geological situation, and I presume we would simply have to produce maps, so that the Court would take judicial notice of it.

Mr. BROWN.—I don't concede that the Yukon River runs into foreign waters.

Mr. McGOWAN.—Well, the only adjacent waters —that is, in addition to the Alaskan waters, are the waters of [86] the Dominion of Canada.

Mr. BROWN.—I don't admit that all of the waters adjacent to Alaska are foreign waters.

Mr. McGOWAN.—I mean the interior—above the mouth.

Mr. BROWN.—Oh, yes.

Mr. McGOWAN.—That is admitted. The position is this: The Code says "elsewhere," and I want to show that from the geographical conditions of this country, that the only "elsewhere" that Congress had in mind was in the surrounding country—the only possible "elsewhere" they had in mind was a foreign country. That is the purpose of it, just to qualify ourselves safely within that section.

Mr. BROWN.—Well, we will admit that the Yukon River runs from foreign territory through Alaska, and through Alaska to Bering Sea.

Mr. McGOWAN.—And that these boats are river steamboats, operating on the Yukon River, and not sea-going boats?

Mr. CROSSLEY.—Except that they go from St. Michael to Nome.

Mr. McGOWAN.—But not sea-going boats. Now, taking up 612. The Referee appointed to report the testimony has taken the testimony. He has also made his findings in that report, and we at this time move the Court to set aside the report, and the findings of fact and conclusions of law set forth therein, and each and all thereof, made by Guy B. Erwin, the Referee heretofore appointed herein, and object to the adoption thereof, on the following grounds, to wit: (Reading from Motion to Set Aside.) [87]

Mr. BROWN.—Excuse me a minute. You have rested your case?

Mr. McGOWAN.—Yes. We have both rested. (Proceeds to read paragraph one.) Now, if the Court please, the remaining paragraphs 3 and 4 are practically the same. We cover the findings separately. They are not sustained by the evidence; they are wrong in fact. That is the effect of the objection at this time, until we arrive at the sixth. (Reads.)

COURT.—Paragraph six you are reading from?

Mr. McGOWAN.—Yes.

. . . Statement by counsel for the defendants as to the disabling of the steamer "Sarah" in

August, 1908, and substitution of steamer "Hannah," followed by argument as to liability of defendants for two licenses.

Mr. McGOWAN.—Now, the next objection, may the Court please, in a general way to the findings, is that the Referee has returned findings to the Court as well as the evidence, and taking the original order of reference in this case (reads Order Appointing Referee), we contend, if the Court please, that the findings as made by the Referee were improperly made, and that the findings should be made by the Court itself upon the testimony returned by the Referee. As to the law of the case, of course I take it that the decision as rendered by the Court under Judge Cushman at that time is still considered by this Court to be the law, and it is therefore unnecessary for me to take up the time of the Court to go into that.

COURT.—Yes.

Mr. McGOWAN.—That being so, we submit case number 612. [88]

Mr. BROWN.—Now, may the Court please, all the matters that Mr. McGowan has mentioned in the way of objections to the Referee's report, with one exception, have been already passed on by Your Honor and Judge Cushman. The liability of these boats to pay the tax, although they were operating between American and foreign ports, and paid a tonnage tax or tonnage fee in Dawson, in the Dominion of Canada, has not been decided to exempt them from the license tax, which is of an entirely different nature. That is under the Act of Congress, provided

for in the Alaska Code. Now, with reference to the steamers "Hannah" and "Sarah," Mr. McGowan claims that the one steamer was substituted for the other, and that the license can be transferred. Your Honor will observe that the law requires the license to be levied upon the steamers that are operating, without regard to how long or for what period they are operated for each year. Now, the "Hannah" may have operated for only one trip, but becomes liable for the tax; the "Sarah" may have operated for only one trip, but still becomes liable for the tax, as this license is not transferable. This license is, one may call it, a personal privilege as applied to each of the steamers. It is not measured by the ability of the company to run several steamers, or how many they can run, but it is levied upon each steamer that does run. That is the measure of the license tax. The law says that a person operating steamers under the conditions named in the statute shall pay a license tax of so much per ton of net tonnage upon each steamer so operated. Now, that means just what it says. It doesn't mean that if one steamer makes a trip this week, and pays a license, and another steamer makes the same trip next week, that the [89] steamer making the trip next week can operate under the license of the steamer making the trip the first week. The law means just what it says: that each steamer operating must pay a license tax.

Now, of course, the order of reference did not require the Referee to make findings of fact and conclusions of law, but he has embraced in his report

what are essentially findings of fact and conclusions of law, and which—although they are not strictly in accordance with the Court, I would suggest that the Court, if he agrees with them, adopt them or consider them as the findings of this Court, and that this Court base its judgment upon them.

There does not seem to be any other questions raised by Mr. McGowan that were not raised upon the original hearing before your Honor and Judge Cushman, and I consider that that is *res judicata* as far as this case is concerned, and for that reason I do not care to argue the matter. The matter is already settled. It is the law of the case, and the case has proceeded upon the assumption that that was the law of the case, and there is no necessity to go over all the argument in favor of the position which your Honor had decided. So that the only questions before the Court in the report of the Referee are, first: whether the tax paid on the "Sarah"—the license which should have been paid on the "Sarah" and which was not paid—should be considered as a joint license fee on account of the "Sarah" and "Hannah"; and whether or not, even if the Referee's report is informal, in containing more than he was authorized to put in, whether or not your Honor will not, in considering the nature of the case, and rather than strike out the findings of fact and [90] conclusions of law, adopt them as the conclusions of law and findings of fact of the Court.

COURT.—Have the attorneys any authority with reference to the transfer of such licenses?

Mr. McGOWAN.—If your Honor please, I have not.

COURT.—I will allow you to submit authorities on that point. You will have until Tuesday of next week.

Mr. McGOWAN.—612 is submitted. We will now take, if the Court please, 657.

By the COURT.—The motions on the question with reference to striking the Referee's conclusions of law are denied, and accepted to this extent: That the Court after consideration will, independent of the fact that they are the Referee's findings, but probably using them as a guide, accept them as the finding of this Court, so modified as the subsequent ruling on the question of the transfer of the license from the steamer "Sarah" to the steamer "Hannah" may direct.

Mr. McGOWAN.—To which ruling defendant excepts.

COURT.—The exception is allowed. [91]

That thereafter, and in pursuance of its ruling theretofore made, the Court did, on the 5th day of June, 1912, make and enter its judgment; to which the defendant then and there excepted and which exception was allowed by the Court. [92]

That thereafter, and within the time prescribed by law, the defendant in the above-entitled action served and filed its motion for a new trial, which was as follows, to wit: [93]

[Title of Court and Cause.]

Motion for New Trial.

To the Above-named Plaintiff, to James J. Crossley, Esq., United States District Attorney, and to John K. Brown, Esq., Assistant United States District Attorney:

You will please take notice that the above-named defendants now move the above-named Court to set aside its decision and judgment in the above-entitled case and to grant a new trial therein, on the following grounds, to wit:

(1) Insufficiency of the evidence to justify the decision and judgment of the Court in said action, and that said decision and judgment are against law;

(2) Errors in law occurring at the trial of said action and excepted to by the defendants.

This motion will be made upon the pleadings and all proceedings had and taken in this action, on file in the office of the clerk of this Court, and also upon the testimony and the records of the Court, and at the hearing defendants will rely upon the following grounds:

I.

Insufficiency of the evidence to justify the decision of the Court in this that the uncontradicted evidence shows that all of the steamers mentioned in the Referee's report, which said report was adopted by the Court as its findings, were operated by the defendants upon the waters of the Yukon River, within the Territory of Alaska, and within the Yukon Territory, [94] Dominion of Canada, and

that each and all of them were required to, and did, pay a license or tax to the Government of the said Dominion of Canada, and that therefore the said steamers were not liable for a license or tax under the laws of the Territory of Alaska or of the United States of America.

And further, in that the uncontradicted evidence shows that all of the steamers mentioned in the report and findings aforesaid were operated by the defendants elsewhere than in the Territory of Alaska, and were required to, and did, pay a tonnage tax elsewhere than in the Territory of Alaska, namely, in the Yukon Territory of the Dominion of Canada; and in this connection, the defendants hereby rely upon all of the grounds set forth in their motion to set aside the report of the Referee herein.

II.

Errors of law occurring at the trial of said action and duly excepted to by defendants, in that:

(a) The Court erred in finding that the defendants were liable to pay a tonnage tax on the steamers mentioned in the said Referee's report, which was adopted by the Court as its findings, in the following particulars to wit, upon all of the grounds set forth in defendants' motion to set aside said report of said Referee.

(b) The Court erred in holding that the word "elsewhere" as used in section 29, chapter 1, part 3, of the Alaska Codes, meant places in the United States of America and not places beyond the United States of America.

(c) The Court erred in finding that the steam-

boats mentioned in said report and findings were liable to a tonnage tax as found against them, for the reason that said boats were operated on Alaska waters and in the waters of the Yukon Territory [95] of the Dominion of Canada, and were liable to, and did, pay a license tax within the Dominion of Canada.

(d) The Court erred in finding that any or all of the boats set forth in the said findings were liable to pay a license tax to the plaintiff, for the reason that none of said boats, under the Codes of Alaska, were liable to pay any license tax.

(e) The Court erred in finding that the defendants, or either of them, were liable to pay any of the license fees found against them.

(f) The Court erred in finding that the steamer "Hannah" was liable to pay a license fee for the year 1908, as it appears from the evidence that she was put in commission to make one trip for the steamer "Sarah," which was disabled, and that the license of the steamer "Sarah" should have been transferred to the steamer "Hannah."

(g) The Court erred in finding that there was due from the defendant, the Northern Commercial Company, the sum of $5,090.00, or any other sum, for license fee or tax on the steamers operated by said defendant, as shown by said Referee's report.

(h) The Court erred in finding that there was due from the defendant, the Northern Navigation Company, the sum of $12,384.00, or any other sum, for such license fee or tax on the steamers operated by it, as shown by said Referee's report.

(i) The Court erred in adjudging and decreeing that the plaintiff recover from the defendant, the Northern Commercial Company, the sum of $5,090.00, or any other sum.

(j) The Court erred in adjudging and decreeing that the plaintiff recover from the defendant, the Northern Navigation Company, the sum of $12,-384.00, or any other sum. [96]

(k) The Court erred in adopting the report of the Referee in the above-entitled action.

Dated at Fairbanks, Alaska, this sixth day of June, A. D. one thousand nine hundred twelve.

McGOWAN & CLARK,
Attorneys for Defendants.

Service of copy of within motion acknowledged this 6th day of June, 1912.

JOHN K. BROWN,
Asst. U. S. District Atty.,
Attorney for Plaintiff.

[Indorsed]: No. 612. (Title of Court and Cause.) Filed in District Court, Territory of Alaska, 4th Div. June 6th, 1912. C. C. Page, Clerk. By H. C. Green, Deputy. [97]

After argument on said motion for new trial, the said Court on the 6th day of June, 1912, then and there overruled said motion for new trial, and made and entered its order denying the motion for new trial, which said order was as follows, to wit: [98]

[Title of Court and Cause.]

Order Denying Motion for New Trial.

The defendants' motion for a new trial coming on by consent to be heard on this date, Thos. A. Mc-

Gowan, Esq., of the firm of McGowan & Clark, appearing in favor of said motion, and John K. Brown, Assistant United States Attorney, appearing in opposition thereto, and after hearing and consideration by the Court;

It is ordered that the defendants' motion for a new trial in the above-entitled action be, and the same is, hereby denied.

The defendants then and there excepted to the ruling of the Court and their exception is hereby allowed.

Done at Fairbanks, Alaska, this sixth day of June, A. D. one thousand nine hundred twelve.

PETER D. OVERFIELD,
District Judge.

Entered in Court Journal 12, page 56.

To which defendant then and there excepted, and which exception was allowed by the Court. [99]

And now, in furtherance of justice and that right may be done the petitioners the Northern Commercial Company and the Northern Navigation Company, defendants in the above-entitled action present the foregoing Bill of Exceptions in this cause and pray that the same may be settled and allowed and signed and certified by the Judge of this Court in the manner prescribed by law.

McGOWAN & CLARK,
Attorneys for Defendants. [100]

Stipulation [Concerning Bill of Exceptions].

It is hereby stipulated as follows:

(1) That, within the time allowed by law, as extended by stipulations of counsel and confirmed by

orders of Court, the foregoing bill of exceptions was served upon plaintiff's by defendants' counsel, and the attorneys for plaintiff do hereby admit the due and timely service thereof.

(2) That the foregoing bill of exceptions may be settled and allowed by the Court as the bill of exceptions to be used on the appeal from the judgment made and entered in the above-entitled cause, whether said appeal be prosecuted by writ of error, or by appeal direct, or by both; attorneys for plaintiff hereby expressly agreeing that, inasmuch as counsel for both sides are in doubt as to whether said appeal should be prosecuted by an appeal direct, or by writ of error, or by both, therefore it is stipulated that the foregoing bill of exceptions, when settled and allowed, may be used by the defendants on any appeal that may be prosecuted from the judgment in this action, whether the same shall be prosecuted by appeal direct, or by writ of error, or by both, and that, in the event of a dismissal of either the appeal direct or of the writ of error, thereupon this bill of exceptions shall stand as the bill of exceptions to be used on the hearing in the Court of Appeals in whichever form the same may be heard.

(3) That the foregoing bill of exceptions may be filed on this date in the office of the clerk of the above-entitled court, at Fairbanks, Alaska, and shall thereupon be mailed by the clerk to Hon. Peter D. Overfield, formerly Judge of the above-entitled court, but now Judge of the Third Judicial Division of the Territory of Alaska, at Valdez, Alaska, for his order settling and allowing the same; and that,

pending the return thereof, the defendants' [101] time for having the foregoing bill of exceptions settled and filed shall be extended accordingly; the attorneys for plaintiff hereby agreeing that it shall not be necessary for defendants to procure further stipulations or orders extending the time to settle and file the foregoing bill of exceptions, and hereby expressly consenting that the said time shall be extended until the return of the said bill of exceptions as aforesaid.

Dated at Fairbanks, Alaska, this 19th day of November, 1912.

JAMES J. CROSSLEY,
U. S. District Attorney,
Attorney for Plaintiff.
By JOHN K. BROWN,
Asst. U. S. District Attorney.
McGOWAN & CLARK.
Attorneys for Defendants. [102]

[Title of Court and Cause.]

Order Settling and Allowing Bill of Exceptions.

On this —— day of ————, 1912, and within due time, the defendants in the action here entitled, by their attorneys, Messrs. McGowan & Clark, duly presented the foregoing bill of exceptions for settlement and allowance, in the manner prescribed by law and the practice of the above-named court; and it appearing to the Court, from the stipulation of counsel, that said bill of exceptions has been heretofore duly served and filed within the time allowed by law, and that the same is true and correct in all respects and contains all the material, testimony, evi-

dence, and exhibits, and other proof whatsoever, introduced by either party during the hearing of said cause; and the Court being fully advised in the premises;

It is ordered that the said bill of exceptions be, and the same is, hereby allowed, settled, approved, and signed as the bill of exceptions for use on appeal in the above-entitled cause, and that the same be made a part of the record in said cause;

It is further ordered that the said bill of exceptions is settled and allowed as the bill of exceptions for use on the hearing of any appeal that may be prosecuted from the judgment in the above-entitled cause, whether the same be prosecuted by writ of error, or by appeal direct, or by both.

Done in open court, at Juneau, Alaska, on this 9th day of December, A. D. 1912.

PETER D. OVERFIELD,
District Judge.

Entered in Court Journal No. 12, page 314. [103]

[Indorsed]: "Original. No. 612. District Court, Territory of Alaska, Fourth Judicial Division. United States of America, Plaintiff, vs. Northern Commercial Company and Northern Navigation Company, Corporations, Defendants. Bill of Exceptions. Filed per stipulation. In the District Court, Territory of Alaska, 4th Div. Nov. 19, 1912. C. C. Page, Clerk. In the District Court for the District of Alaska, Division No. 1. Filed Dec. 9, 1912. E. W. Pettit, Clerk." [104]

[Title of Court and Cause.]

Petition for Writ of Error.

The defendants Northern Commercial Company and Northern Navigation Company in the above-entitled action, feeling themselves aggrieved by the judgment of the Court made and entered in the above-entitled cause by the above-named court on the fifth day of June, A. D. one thousand nine hundred twelve, wherein and whereby the above-named court rendered judgment against said Northern Commercial Company for the sum of five thousand ninety dollars and against said Northern Navigation Company for the sum of twelve thousand three hundred eighty four dollars, and costs against both said defendants.

Now, come Messrs. McGowan & Clark, their attorneys, and petition this Honorable Court for an order allowing these defendants to prosecute a writ of error to the Honorable Circuit Court of Appeals for the Ninth Circuit, at San Francisco, State of California, according to the laws in that behalf made and provided;

And whereas the said defendants desire a stay of execution, pending the hearing of the said writ of error by the United States Circuit Court of Appeals for the Ninth Circuit, now, therefore, said defendants petition that an order be made fixing the amount of security which said defendants shall give and furnish on said writ of error, and that, on the giving of such security, all further proceedings in this court may be suspended and stayed until the de-

termination of said writ of **[105]** error by the said Circuit Court of Appeals for the Ninth Circuit.

And your petitioner will ever pray.

May 19, 1913.

McGOWAN & CLARK,
Attorneys for Defendants.

Due service hereof admitted this May 19, 1913.

JAMES J. CROSSLEY,
U. S. Attorney, Attorney for Plff.

[Endorsed]: No. 612. In the United States District Court, Territory of Alaska, Fourth Division. United States of America, Plaintiff, vs. Northern Commercial Co. et al., Defendants. Petition for Writ of Error. Filed in the District Court, Territory of Alaska, 4th Div. May 20, 1913. C. C. Page, Clerk. By H. C. Green, Deputy. **[106]**

[Title of Court and Cause.]

Petition for Appeal.

Come now the above-named defendants, Northern Commercial Company and Northern Navigation Company, who, conceiving themselves aggrieved by the judgment and decree of this Court made and entered in the above-entitled cause on the fifth day of June, 1912, in the above-named court, do hereby appeal from the said judgment and decree and the whole thereof to the United States Circuit Court of Appeals for the Ninth Circuit, for the reasons specified in the assignment of errors filed herein, and appellants pray that this appeal be allowed and that a transcript of the record, proceedings, and papers on which said judgment and decree was made, together with all pleadings and the exhibits annexed

thereto, all testimony and proofs adduced in the case, all judgments interlocutory or final, opinions of the Court whether interlocutory or final, bill of exceptions, final decree, notice of appeal, and assignment of errors, duly authenticated, may be sent to the United States Circuit Court of Appeals, at San Francisco, California.

Defendants further pray that an order be made, fixing the amount of the security which appellants shall give and furnish on said appeal, and that, on the giving of such security, all further proceedings in this court shall be suspended and stayed until the determination of said appeal by the said United States Circuit Court of Appeals. **[107]**

And your petitioner will ever pray.

Dated on this 19th day of May, A. D. one thousand nine hundred thirteen.

McGOWAN & CLARK,
Attorneys for Defendants.

Due service hereof admitted this May 19, 1913.

JAMES J. CROSSLEY,
U. S. Attorney,
Attorney for Plff.

[Endorsed]: No. 612. In the United States District Court, Territory of Alaska, Fourth Division. United States of America, Plaintiff, vs. Northern Commercial Co. et al., Defendants. Petition for Appeal. Filed in the District Court, Territory of Alaska, 4th Div. May 20, 1913. C. C. Page, Clerk. By H. C. Green, Deputy. **[108]**

[Title of Court and Cause.]

Assignment of Errors.

TO BE SUED ON WRIT OF ERROR AND DIRECT APPEAL AND BOTH.

Come now the defendants in the above-entitled cause, being the plaintiffs in error or appellants, and assign the following errors as having been committed by the above-named court on the trial of the above-entitled action, which errors the said defendants intend to, and do, rely upon in their writ of error and appeal and both, to be prosecuted in the United States Circuit Court of Appeals for the Ninth Circuit.

(1) The Court erred in deciding (order of Judges Cushman and Overfield of date 24 August, 1911), "That the defendant, the Northern Commercial Company, a corporation, is liable to pay to the United States a license tax of one dollar per ton per annum for the years 1905 to 1911, both inclusive, on the net tonnage, customs-house measurement, of each of its freight and passenger steamships registered in the District of Alaska and propelled by mechanical power."

(2) The Court erred in its order of 24 August, 1911, by referring the said action to a Referee for an accounting and in compelling the defendants herein to enter into an accounting before said Referee.

(3) The Court erred in its said order of 24 August, 1911, in determining that the defendants were liable to pay any license tax and in not finding in favor of the defendants and dismissing the said action.

(4) The Court erred in its said order and in its final judgment herein in determining that the defendants were liable, under that part of section 460 of the Code of Criminal Procedure of the District of Alaska set forth in paragraph 2 of the **[109]** Statement of facts and Stipulation for Submission without Action.

(5) The Court erred in finding that the word "elsewhere," as used in the section of the statute in controversy, meant places in the United States and not places beyond the United States.

(6) The Court erred in finding against the contention of the defendants set out in paragraph 8 of said Statement of Facts and Stipulation for Submission without Action, to wit, the defendant contended that it should not be compelled to pay a license of one dollar per ton per annum on the net tonnage, customs-house measurement, on such of its vessels as were operated conjunctively on the waters of the Yukon River within the Territory of Alaska and the waters of the Yukon River within the Yukon Territory of the Dominion of Canada.

(7) The Court erred in finding against the contention of the defendants set out in paragraph 9 of said Statement of Facts and Stipulation for Submission without Action, to wit, that the defendant should not be required to pay a license of one dollar per ton on any of its river steamboats operated, whether operated wholly on the waters of Alaska or elsewhere.

(8) The Court erred in determining that the section of the Alaska Code set forth in said Statement

of Facts and Stipulation for Submission without Action was not so ambiguous, indefinite and unintelligible as to render the same ineffective and void, and in construing said section against the defendants.

(9) The Court erred in its order of 24 August, 1911, and in its final judgment herein in determining that the section of said Codes last aforesaid was a valid act or law.

(10) The Court erred in its judgment on the report of the Referee of 5 June, 1912, in overruling the defendants' objections to said report and defendants' motion to set aside the same. **[110]**

(11) The Court erred in its judgment of 5 June, 1912, in ordering, adjudging, and decreeing that the said report of the Referee, including the findings of fact and conclusions of law, be in all respects approved and confirmed.

(12) The Court erred in rendering judgment against the defendants and in approving the report of said Referee in this, that the evidence is contrary to the findings of said Referee and is insufficient to justify the said judgment, in the following particulars, to wit:

(a) That the uncontradicted evidence shows that all the steamboats mentioned in the Referee's report, which said report was adopted by the Court as its findings, were operated by the defendants on the waters of the Yukon River within the Yukon Territory, as well as on the waters of the Yukon River within the Yukon Territory of the Dominion of Canada, and that each and all of said steamers were required to, and did, pay a license or tax to the Gov-

ernment of the Dominion of Canada, and that therefore the said steamboats were not liable for a license or tax under the laws of the Territory of Alaska or of the United States of America.

(b) That the uncontradicted evidence shows that all the steamboats mentioned in the report and findings aforesaid were operated by the defendants elsewhere than in the Territory of Alaska, and were required to, and did, pay a tonnage tax elsewhere than in the Territory of Alaska, to wit, in the Yukon Territory of the Dominion of Canada.

(13) The Court erred in adopting the Referee's report herein in this that the same is contrary to the evidence in the particulars set out in Assignment of Error No. 12.

(14) The Court erred in adopting finding of fact No. 5 of the Referee, to wit: "That the Northern Commercial Company and the Northern Navigation Company are liable to pay to the United States a license tax of one dollar per ton per annum **[111]** on the net tonnage, customs house measurement, of each of its freight and passenger steamers registered in the Territory of Alaska, operated foreign, i. e., on the Yukon River and its tributaries, both in the Territory of Alaska and the Yukon Territory, Dominion of Canada, for the years 1905 to 1911 inclusive," for the reason that the same is contrary to the evidence and to law.

(15) The Court erred in adopting that part of section 12 of the Referee's finding No. 6, to wit: "And that the said Northern Commercial Company is liable to pay to the United States as license tax on its said

steamers for the years 1905 to 1906, inclusive, the total sum of $5,090.00," for the reason that the same is contrary to the evidence and to law.

(16) The Court erred in adopting that part of section 30 of the Referee's finding No. 7, to wit: "And that the defendant Northern Navigation Company is liable to pay to the United States as license tax on its said steamers operated foreign, for the years 1907 to 1911, inclusive, the total sum of $12,-384," for the reason that the same is contrary to the evidence and to law.

(17) The Court erred in adopting the Referee's report and in determining by its judgment of 5 June, 1912, that the defendants are liable to pay a tonnage tax, or other tax, on the steamers referred to in the Referee's report, or on any steamers operated by them, in this that the said finding is contrary to law, for the reason that the defendants should not be required to pay the license or tonnage tax in question on any of the river steamers operated by them, whether operated wholly on the waters of Alaska or elsewhere, under the statute in controversy, owing to the ambiguity and uncertainty of the provisions of said statute. **[112]**

(18) The Court erred in adopting the finding of the Referee and in determining by its judgment that the steamer "Hannah" was liable to pay a tonnage tax for the year 1908, for the reason that the same is contrary to the evidence, from which it appears that the said steamer was put in commission to make but one trip for her sister ship the steamer "Sarah," which was disabled, and that the license of the

steamer "Sarah" should have been transferred to the steamer "Hannah."

(19) The Court erred in determining by its judgment of 5 June, 1911, that there was due from the defendant Northern Commercial Company the sum of $5,090.00, or any other sum, for license fees on the steamers operated by it.

(20) The Court erred in determining by its judgment of 5 June, 1911, that there was due from the defendant Northern Navigation Company the sum of $12,348.00, or any other sum, for license fees on the steamers operated by it.

(21) The Court erred in giving final judgment against the defendants and in refusing to render judgment in favor of the defendants.

(22) The Court erred in overruling and denying the defendants' motion for a new trial, and thereby determining that the evidence was sufficient to justify the judgment and that said judgment was sustained in law.

(23) The Court erred in rendering its said judgment of 5 June, 1911, in favor of the plaintiff and against the defendants, for the reason that said judgment is contrary to the evidence; the evidence is insufficient to justify the same; and that said decision and judgment are contrary to law.

(24) The Court erred in rendering judgment against defendants for their costs.

WHEREFORE: The defendants pray that the judgment in the above-entitled action may be reversed and that they may be allowed all things that

they have lost thereby.

19 May, 1913. McGOWAN & CLARK,
Attorneys for Defendants. **[113]**

Due service of the foregoing assignment of errors is hereby admitted this nineteenth day of May, 1913, and it is stipulated that the same may be used on appeal and on writ of error and both.

JAMES J. CROSSLEY,
U. S. Attorney.
Attorney for Plaintiff.

[Endorsed]: No. 612. In the United States District Court, Territory of Alaska, Fourth Division. United States of America, Plaintiff, vs. Northern Commercial Co. et al., Defendants. Assignment of Errors. Filed in the District Court, Territory of Alaska. 4th Div. May 20, 1913. C. C. Page, Clerk. By H. C. Green, Deputy. **[114]**

[Title of Court and Cause.]

Order Allowing Writ of Error and Fixing Bond.

On motion of Messrs. McGowan & Clark, attorneys for defendants, and the filing of a petition for a writ of error and assignment of errors,—

It is ordered that a writ of error be, and the same is allowed, to have reviewed in the United States Circuit Court of Appeals for the Ninth Circuit, at the city of San Francisco, State of California, the judgment heretofore made and entered herein on the fifth day of June, A. D. one thousand nine hundred twelve, and that the amount of the bond on said writ of error be, and the same is hereby fixed at the sum of twenty thousand dollars, to cover supersedeas, costs, and

damages of defendant in error.

Dated at Fairbanks, Alaska, this 19th day of May, A. D. one thousand nine hundred thirteen.

F. E. FULLER,
District Judge.

Entered in Court Journal No. 12, page 589.

Due service hereof admitted this May 19, 1913.

JAMES J. CROSSLEY,
U. S. Attorney.
Attorney for Plff.

[Endorsed]: No. 612. In the United States District Court, Territory of Alaska, Fourth Division. United States of America, Plaintiff, vs. Northern Commercial Co. et al., Defendants. Order Allowing Writ of Error and Fixing Bond. Filed in the District Court, Territory of Alaska, 4th Div., May 20, 1913. C. C. Page, Clerk. By H. C. Green, Deputy. **[115]**

[Title of Court and Cause.]

Order Allowing Appeal and Fixing Amount of Appeal Bond.

Now, on this 19th day of May, A. D. one thousand nine hundred thirteen, the same being one of the judicial days of the December, A. D. one thousand nine hundred twelve, special term of the Court, holden at Fairbanks, in the Fourth Judicial Division of the Territory of Alaska, this cause came on to be heard on the defendants' petition for an appeal, and the Court being advised in the premises,

It is ordered that the defendants' appeal in said cause to the United States Circuit Court of Appeals

for the Ninth Circuit, at San Francisco, State of California, be, and the same is, hereby allowed, and that a certified transcript of the record, proceedings, judgments interlocutory and final, decrees, orders, testimony, bill of exceptions, opinions of the Court, notice of appeal, assignment of errors, and all exhibits herein be transferred to the said United States Circuit Court of Appeals for the Ninth Circuit, at San Francisco, State of California.

It is further ordered that the bond for the sum of twenty thousand dollars, this day filed in this cause, conditioned for the payment of all costs, judgments, and damages that may be rendered by the said United States Circuit Court of Appeals for the Ninth Circuit, whether the same be rendered under writ of error or on direct appeal, shall act and take effect as a supersedeas bond on direct appeal, and also as a bond for costs and damages on appeal, and that no other or further bond be **[116]** required to be given by defendants.

Done in open court at Fairbanks, Alaska, on this 19th day of May, A. D. one thousand nine hundred thirteen.

F. E. FULLER,
District Judge.

Entered in Court Journal No. 12, page 588.

Due service hereof admitted this May 19, 1913.

JAMES J. CROSSLEY,
U. S. Attorney.
Attorney for Plff.

[Endorsed]: No. 612. In the United States District Court, Territory of Alaska, Fourth Division. United States of America, Plaintiff, vs.

Northern Commercial Co. et al., Defendants. Order Allowing Appeal and Fixing Amount of Appeal Bond. Filed in the District Court, Territory of Alaska, 4th Div. May 20, 1913. C. C. Page, Clerk. By H. C. Green, Deputy. **[117]**

[Title of Court and Cause.]

Order Relative to Supersedeas Bond on Writ of Error.

The defendants above named having, on this day, filed their petition for writ of error from the decision and judgment thereon made and entered herein to the United States Circuit Court of Appeals for the Ninth Circuit, at San Francisco, State of California, together with an assignment of errors, within due time, and also praying that an order be made fixing the amount of security which defendants shall give and furnish on said writ of error, and that, on the giving of said security, all further proceedings in this court be suspended and stayed until the determination of said writ of error by the said Circuit Court of Appeals for the Ninth Circuit, and said petition having on this day been duly allowed;

Now, therefore, it is ordered that, on the defendants above named filing with the Clerk of this Court a good and sufficient bond in the sum of twenty thousand dollars, to the effect that, if the said defendants and plaintiffs in error shall prosecute the said writ of error to effect, and answer and pay all judgments, damages, and costs, if they shall fail to make good their said plea, then said obligation to be void, otherwise to remain in full force, effect and virtue, the said

bond to be approved by the Court, all further proceedings in this court shall be, and they are hereby, suspended and stayed until the determination of the said writ of error by the said United States Circuit Court of Appeals for the Ninth Circuit, [118] at the city of San Francisco, State of California.

Dated at Fairbanks, Alaska, this 19th day of May, A. D. one thousand nine hundred thirteen.

F. E. FULLER,
District Judge.

Entered in Court Journal No. 12, page 589.

Due service hereof admitted this May 19, 1913.

JAMES J. CROSSLEY,
U. S. Attorney,
Attorney by Plff.

[Endorsed]: No. 612. In the United States District Court, Territory of Alaska, Fourth Division. United States of America, Plaintiff, vs. Northern Commercial Co. et al., Defendants. Order Relative to Supersedeas Bond on Writ of Error. Filed in the District Court, Territory of Alaska, 4th Div. May 20, 1913. C. C. Page, Clerk. By H. C. Green, Deputy. [119]

[Title of Court and Cause.]

Bond.

KNOW ALL MEN BY THESE PRESENTS, that we, Northern Commercial Company, a corporation, and Northern Navigation Company, a corporation, appellants herein, as principals, and R. C. Wood and Luther C. Hess, of Fairbanks, Alaska, as sureties, are held and firmly bound unto the United States

of America, appellee herein, in the sum of twenty thousand dollars, to be paid to the said United States of America, appellee, for the payment whereof well and truly to be made, we bind ourselves, and each of us, and our and each of our heirs, executors, administrators, successors in interest, and assigns, firmly by these presents.

Sealed with our seals and dated this nineteenth day of May, A. D. one thousand nine hundred thirteen.

Whereas lately, at a District Court for the Territory of Alaska, Fourth Judicial Division, holden at Fairbanks, Alaska, in a suit pending in said court between the United States of America as plaintiff and Northern Commercial Company and Northern Navigation Company as defendants, a judgment was rendered against the defendant Northern Commercial Company for the sum of five thousand ninety dollars, and against the defendant Northern Navigation Company for the sum of twelve thousand three hundred eighty-four dollars, and the said defendants having obtained a writ of error and having been allowed an appeal, and having filed copies thereof in the clerk's office of the said Court, to reverse the judgment in the aforesaid suit, and citations on writ of error and on appeal having been directed to [120] the said United States of America, citing and admonishing it to be and appear at a session of the United States Circuit Court of Appeals for the Ninth Circuit, to be holden at the City of San Francisco, State of California, in said Circuit, on the 16th day of June, A. D. one thousand

nine hundred thirteen next;

And whereas the above-named appellants have appealed by writ of error and appeal—being uncertain as to whether the above-entitled action is an action in equity or an action at law,—to the United States Circuit Court of Appeals for the Ninth Circuit, to reverse the orders, judgments, and decrees of the above-entitled court in this cause;

And whereas it has been stipulated by counsel for both parties to this action that both sides are in doubt, as to whether such appeal should be prosecuted by an appeal direct or by writ of error, and that these presents shall be considered as a supersedeas bond, either on writ of error or appeal, when the said Circuit Court of Appeals for the Ninth Circuit shall have determined the nature of said action, as more fully appears from the stipulation contained in the bill of exceptions settled in this action;

Now, therefore, the conditions of this obligation are such that, if the above-named Northern Commercial Company and Northern Navigation Company shall prosecute said writ of error or appeal, or either or both, to effect, and shall answer and pay all damages and costs if they shall fail to make good their plea, either on appeal or on writ of error, then this obligation shall be void; otherwise to remain in full force, effect and virtue.

And whereas appellants in error or on appeal desire a stay of execution in the above-entitled action, pending the determination of said appeal or writ of error; [121]

Now, therefore, the further condition of this ob-

ligation is such that, if the said Northern Commercial Company and Northern Navigation Company, appellants, shall prosecute either said writ of error or said appeal to effect and shall answer and pay all damages, costs, and judgments, if they fail to make good their said plea, then the foregoing obligation to be void, otherwise to remain in full force, effect and virtue.

NORTHERN COMMERCIAL COMPANY,
By VOLNEY RICHMOND,
Superintendent and Attorney in Fact.
NORTHERN NAVIGATION COMPANY,
By VOLNEY RICHMOND,
Superintendent and Attorney in Fact.
R. C. WOOD,
LUTHER C. HESS.

Territory of Alaska,
Fourth Division,—ss.

R. C. Wood and Luther C. Hess, being first duly sworn, each for himself and not one for the other doth depose and say that he is a resident of Fairbanks Precinct, Territory of Alaska, and is worth the sum of twenty thousand dollars, to wit, the sum specified as the penalty in the foregoing bond, over and above all his just debts and liabilities, in property not exempt from execution and situate within the Territory of Alaska.

R. C. WOOD.
LUTHER C. HESS.

Subscribed and sworn to before me on this nineteenth day of May, A. D. one thousand nine hundred thirteen.

[Seal] JOHN A. CLARK,
Notary Public in and for the District of Alaska.

[122]

It is stipulated that the foregoing bond may be accepted and approved as a supersedeas and cost bond, either on appeal or on writ of error in the above-entitled action, that the same is sufficient in form; and that the sureties thereon may be approved by the Court.

Dated at Fairbanks, Alaska, this nineteenth day of May, A. D. one thousand nine hundred thirteen.

JAMES J. CROSSLEY,
United States District Attorney for the Territory of Alaska, Fourth Judicial Division.
Attorney for Plaintiff.
McGOWAN & CLARK,
Attorneys for Defendants.

Pursuant to the foregoing stipulation, the foregoing bond and the sureties thereon are hereby approved and accepted.

Dated at Fairbanks, Alaska, this nineteenth day of May, A. D. one thousand nine hundred thirteen.

F. E. FULLER.
District Judge.

Due service hereof admitted this May 19, 1913.

JAMES J. CROSSLEY,
U. S. Attorney, Attorney for Plff.

[Endorsed]: No. 612. In the United States District Court, Territory of Alaska, Fourth Division.

United States of America, Plaintiff, vs. Northern Commercial Co. et al., Defendants. Bond on Appeal and Supersedeas. Filed in the District Court, Territory of Alaska, 4th Div. May 20, 1913. C. C. Page, Clerk. By H. C. Green, Deputy. [123]

[Title of Court and Cause.]

Designation of Place for Hearing of Writ of Error and Appeal.

To the Honorable Frederic E. Fuller, Judge of the Above-named Court, and to the Plaintiff and Its Attorney:

Now come the defendants, plaintiffs in error, in the above-entitled action, and pursuant to the provisions of an act of Congress giving the designating of the place of hearing appeals for the Ninth Circuit to the plaintiff in error of the appellant, do hereby designate the City and County of San Francisco, in the State of California, as the place for the hearing of the writ of error and appeal in the above-entitled action.

McGOWAN & CLARK,
Attorneys for Defendants.

Due service hereof admitted this May 24, 1913.

JAMES J. CROSSLEY,
United States District Attorney for the Territory of Alaska, 4th Div.,
Attorney for Plff.
By JOHN K. BROWN,
Assistant.

[Endorsed]: No. 612. In the United States District Court, Territory of Alaska, Fourth Division. United

States of America, Plaintiff, vs. Northern Commercial Co. et al., Defendants. Designation of Place for Hearing of Writ of Error and Appeal. Filed in the District Court, Territory of Alaska, 4th Div. May 24, 1913. C. C. Page, Clerk. By P. R. Wagner, Deputy. [124]

[Title of Court and Cause.]

Writ of Error.

United States of America,
Territory of Alaska,—ss.

The President of the United States of America to the Honorable Frederic E. Fuller, Judge of the District Court for the Territory of Alaska, Fourth Division, Greeting:

Because, in the records and proceedings, as also in the rendition of a judgment dated the fifth day of June, A. D. one thousand nine hundred twelve, of a plea which is in the said District Court for the Territory of Alaska, Fourth Division, before you, between the United States of America as plaintiff, and Northern Commercial Company and Northern Navigation Company as defendants, a manifest error hath happened, to the great prejudice and damage of the said Northern Commercial Company and Northern Navigation Company, as is said and appears by the petition herein,

We, being willing that error, if any hath been, shall be duly corrected and full and speedy justice done to the parties aforesaid in this behalf, do command you that, if said judgment be therein given, then, under your seal, distinctly and openly, you send the

record and proceedings aforesaid, with all things concerning the same, to the Justices of the United States Circuit Court of Appeals for the Ninth Circuit, in the City of San Francisco, State of California, together with this writ, so as to have the same at the said place in the said Circuit on the sixteenth day of June, A. D. one thousand nine [125] hundred thirteen, that, the records and proceedings aforesaid being inspected, the said Circuit Court of Appeals for the Ninth Circuit may cause further to be done therein to correct those errors what of right and according to the laws and customs of the United States should be done.

Witness, the Honorable EDWARD D. WHITE, Chief Justice of the Supreme Court of the United States, this 19th day of May, A. D. one thousand nine hundred thirteen.

Attest my hand and the seal of the District Court for the Territory of Alaska, Fourth Division, at the clerk's office, at Fairbanks, Alaska, on this 19th day of May, A. D. one thousand nine hundred thirteen.

[Seal] C. C. PAGE,
Clerk of the District Court for the Territory of Alaska, Fourth Division.

Allowed this 19th day of May, A. D. one thousand nine hundred thirteen.

F. E. FULLER,
Judge of the District Court for the Territory of Alaska, Fourth Division. [126]

Due service hereof admitted this May 19, 1913.

JAMES J. CROSSLEY,
U. S. Attorney,
Attorney for Plff.

[Endorsed]: No. 612. In the United States District Court, Territory of Alaska, Fourth Division. United States of America, Plaintiff, vs. Northern Commercial Co. et al., Defendants. Writ of Error. [127]

[Title of Court and Cause.]

Citation on Writ of Error.

United States of America,
Territory of Alaska,—ss.

The President of the United States of America to the United States of America and to James J. Crossley, United States District Attorney for the Fourth Judicial Division of the Territory of Alaska, Their Attorney, Greeting:

You are hereby cited and admonished to be and appear at the United States Circuit Court of Appeals for the Ninth Circuit, to be holden in the City and County of San Francisco, in the State of California, within thirty days from the date of this citation, pursuant to the writ of error filed in the office of the clerk of the District Court for the Territory of Alaska, Fourth Judicial Division, wherein the United States of America is defendant in error and Northern Commercial Company and Northern Navigation Company are plaintiffs in error, to show cause, if any there be, why the judgment in the said writ of error mentioned should not be corrected and speedy justice should not be done to the parties in error in that behalf.

WITNESS, the Honorable EDWARD D. WHITE, Chief Justice of the Supreme Court of the United States of America, on this 19th day of May, A. D. one thousand nine hundred thirteen, and in the year of our Independence the one hundred thirty-sixth.

[Seal] F. E. FULLER,
District Judge Presiding in and for the Fourth Judicial Division of the Territory of Alaska. [128]

Due service hereof admitted this May 19, 1913.

JAMES J. CROSSLEY,
U. S. Attorney,
Attorney for Plff.

[Endorsed]: No. 612. In the United States District Court, Territory of Alaska, Fourth Division. United States of America, Plaintiff, vs. Northern Commercial Co. et al., Defendants. Citation on Writ of Error. [129]

[Title of Court and Cause.]

Citation on Appeal.

The President of the United States of America to the Above-named Plaintiff and to James J. Crossley, United States District Attorney for the Territory of Alaska, Fourth Division, Its Attorney, Greeting:

You are hereby cited to be and appear in the United States Circuit Court of Appeals for the Ninth Circuit, to be holden in the city of San Francisco, State of California, within thirty days from the date

of this writ, pursuant to an order allowing appeal made and entered in the above-entitled cause, in which the United States of America is plaintiff and appellee, and Northern Commercial Company and Northern Navigation Company are defendants and appellants, to show cause, if any there be, why the judgment and decree made and rendered in said action on the fifth day of June, A. D. one thousand nine hundred twelve, as in said order allowing appeal mentioned should not be set aside and reversed and why speedy justice should not be done to said defendants in that behalf.

WITNESS the Honorable EDWARD D. WHITE, Chief Justice of the Supreme Court of the United States of America, on this 19th day of May, A. D. one thousand nine hundred thirteen, and in the year of our independence, the one hundred thirty-sixth.

Attest my hand and the seal of the above-named District Court, at Fairbanks, Alaska, on this 19th day of May, A. D. one thousand nine hundred thirteen.

[Seal] F. E. FULLER,
District Judge. [130]

Due service hereof admitted this May 19, 1913.
JAMES J. CROSSLEY,
U. S. Attorney,
Attorney for Plff.

[Endorsed]: No. 612. In the United States District Court, Territory of Alaska, Fourth Division. United States of America, Plaintiff, vs. Northern Commercial Co., et al., Defendants. Citation on Appeal. [131]

[Title of Court and Cause.]

Order Extending Time Within Which to Perfect Appeal.

On this day the above-entitled cause came on to be heard before the Judge in the above-named court, on the application of the defendants herein for an order extending the return days for writ of error and appeal herein, and the parties appearing by their respective attorneys and it appearing to the Court that it is necessary, owing to the great distance from Fairbanks, Alaska, to San Francisco, California, and the slow and uncertain communication between said places, that an order extending the time within which to docket said cause and to file the record therein with the Clerk of the United States Circuit Court of Appeals for the Ninth Circuit, at San Francisco, California, until and including the first day of August, A. D. one thousand nine hundred thirteen, should be made, the Court, being fully advised in the premises and deeming that good cause exists therefor;

It is hereby ordered that the time within which said appellants shall perfect said cause on appeal and upon writ of error and both, and docket and file the record thereof in said United States Circuit Court of Appeals for the Ninth Circuit, at San Francisco, California, be, and the same is, hereby enlarged and extended to and including the first day of August, A. D. one thousand nine hundred thirteen;

It is further ordered that but one record need be transmitted to the said Clerk of the United States Circuit Court of [132] Appeals for the Ninth Cir-

cuit, and that said record shall be used on the hearing of said appeal on direct appeal and on writ of error and both.

Dated at Fairbanks, Alaska, this 24th day of May, A. D. one thousand nine hundred thirteen.

Entered in Court Journal No. 12, page 601.

F. E. FULLER,
District Judge.

O. K.—J. J. C.,
U. S. Atty. [133]

Due service hereof admitted this May 24, 1913.

JAMES J. CROSSLEY,
U. S. Attorney,
Attorney for Plff.
By JOHN K. BROWN,
Assistant.

[Endorsed]: No. 612. In the United States District Court, Territory of Alaska, Fourth Division. United States of America, Plaintiff, vs. Northern Commercial Co. et al., Defendants. Order Extending Time Within Which to Perfect Appeal. Filed in the District Court, Territory of Alaska, 4th Div. May 24, 1913. C. C. Page, Clerk. By P. R. Wagner, Deputy. [134]

[Title of Court and Cause.]

Stipulation [That Respective Parties may Argue and Submit a Certain Question to Appellate Court for Decision, etc.].

Whereas the matters in controversy in this action were, under instructions from the United States At-

torney General, submitted to the Court under a statement of facts and stipulation for submission without action, which stipulation was entered into between the United States of America and the defendants herein;

And whereas it was intended by said stipulation to secure a construction of that portion of section 460 of the Code of Criminal Procedure of Alaska, which is set out in the original statement of submission as amended at the trial;

And whereas, since the trial of this action, it has been contended by counsel for the plaintiff that the barges, used by the defendants in connection with their operations, should also be liable to a tonnage tax under the provisions of said section;

Now, therefore, for the purpose of having the Appellate Court construe all questions of difference between the United States and the defendants in the present action, so that the rights of the parties may be fully settled herein and that multiplicity of actions be thereby avoided, it is stipulated;

(1) That, when this action is heard in the Appellate Court, the respective parties hereto may argue and submit to the Court, for its decision, the question as to whether barges, which are not propelled by power of any kind and are without steering gear, and which are either towed or pushed by steamboats, are subject to the payment of the tonnage tax provided by the section aforesaid; [135]

(2) That for the purpose of presenting this matter fully to the Appellate Court, both parties hereto may argue and brief this point, and the Ap-

pellate Court may, in its opinion, give its decision thereon, and that, pending said decision, all proceedings, as against the defendants by the United States of America, for the recovery of tonnage taxes on barges, shall be stayed, and that the District Court may enter an order staying proceedings therein;

(3) That for the purpose of presenting this point fully and fairly to the Court, it is stipulated that the said barges are registered in Alaska and are used by the defendants in connection with the river steamers covered by the testimony in this case; that some of said barges are operated on the waters of the Yukon River within the Dominion of Canada as well as on the waters of the Yukon River, within the Territory of Alaska, under the same conditions, as appears from the testimony in this case relating to the river steamers therein referred to; that all barges so operated are not propelled by mechanical power of any kind, but are towed or pushed through the waters by the river steamers operated by the defendants on the Yukon River, as shown by the testimony contained in this record; and that none of said barges have either crews, steering gear, or power of any kind, in or on themselves, but are used merely for carrying freight;

(4) That this stipulation is made for the purpose of avoiding a multiplicity of actions and to secure the decision of the Circuit Court of Appeals on this question, as a construction of the section of the Code in controversy is necessary to determine the liability of the defendants as to whether or not they should pay the license tax in question on barges operated

by them from the year 1905 to and including the year 1911, being the same term of years mentioned in the pleadings [136] in this action, as appears from the records of the Court therein.

Dated at Fairbanks, Alaska, this 2d day of June, 1913.

JAMES J. CROSSLEY,
United States Attorney,
Attorney for Plaintiff.
McGOWAN & CLARK,
Attorneys for Defendants.

[Endorsed]: No. 612. In the United States District Court, Territory of Alaska, Fourth Division. United States, Plaintiff, vs. N. C. Co. & N. N. Co. Stipulation as to Tonnage Tax on Barges. Filed in the District Court, Territory of Alaska, 4th Div. Jun. 3, 1913. C. C. Page, Clerk. By P. R. Wagner, Deputy. [137]

[Certificate of Clerk of U. S. District Court to Transcript of Record, etc.]

[Title of Court and Cause.]

United States of America,
Territory of Alaska,
Fourth Division,—ss.

I, C. C. Page, Clerk of the District Court, Territory of Alaska, Fourth Division, do hereby certify, that the above and foregoing, and hereto annexed one hundred thirty-seven typewritten pages, numbered from 1 to 137, inclusive, constitute a full, true and correct copy, and the whole thereof, including the

indorsements, of the record in cause No. 612, entitled: United States of America, Plaintiff, vs. Northern Commercial Company & Northern Navigation Company, Defendants, wherein the United States of America is Defendant in Error and Appellee and the Northern Commercial Company & Northern Navigation Company are Plaintiffs in Error and Appellants, made in accordance with the praecipe of the Plaintiffs in Error and Appellants, filed herein and made a part hereof; and that the same is by virtue of the writ of error, order of appeal, and citation issued in said cause and is a return thereof in accordance therewith.

And I further certify that this transcript was prepared by me, in my office, and that the costs of preparing same, and certificate, amounting to Fifty-one Dollars and Thirty Cents ($51.30) was paid to me by counsel for Plaintiff in Error and Appellants. [138]

IN WITNESS WHEREOF, I have hereunto set my hand and affixed the seal of said Court, at Fairbanks, Alaska, this fourteenth day of June, 1913.

[Seal] C. C. PAGE,

Clerk District Court, Territory of Alaska, Fourth Division.

By H. C. Green,
Deputy. [139]

[Endorsed]: No. 2293. United States Circuit Court of Appeals for the Ninth Circuit. Northern Commercial Company and Northern Navigation Company, Plaintiffs in Error and Appellants, vs. United States of America, Defendant in Error and

Appellee. Transcript of Record. Upon Writ of Error to and Upon Appeal from the United States District Court of the Territory of Alaska, Fourth Division.

Received July 28, 1913.

F. D. MONCKTON,
Clerk.

Filed July 28, 1913.

F. D. MONCKTON,
Clerk of the United States Circuit Court of Appeals for the Ninth Circuit.

By Meredith Sawyer,
Deputy Clerk.

No. 2293

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

NORTHERN COMMERCIAL COMPANY and NORTHERN NAVIGATION COMPANY,

Plaintiffs in Error and Appellants,

vs.

UNITED STATES OF AMERICA,

Defendant in Error and Appellee.

BRIEF OF PLAINTIFFS IN ERROR AND APPELLANTS.

Statement of Facts.

This case comes up on writ of error and appeal upon an agreed statement of facts, which is briefly as follows (Transcript of Record, pp. 4-10, 38-39, 125-128):

The Northern Commercial Company, and the Northern Navigation Company, for some years past, have operated steamboats and barges for the transportation of freight and passengers on the Yukon River in Alaska and also between points in Alaska and Canada.

All of these steamboats and barges are registered in Alaska. Certain of them that ply between Canada and the District of Alaska have been compelled to pay a license tax to the Canadian Government at Dawson, Yukon Territory, Canada.

This suit was brought in 1906 in the District Court for the District of Alaska for the purpose of collecting the license tax, for the years 1905 and 1906, provided for in Section 460, Carter's Code of Criminal Procedure of Alaska (now Section 2569 of the Compiled Laws of Alaska, 1913) upon all of the boats of the appellant company not then paying the tax.

The controversy was submitted to the Court upon the agreed statement of facts in October, 1906, and by an order of Court dated August 24, 1911, it was adjudged that the defendant companies were liable to pay the license tax, and the case was ordered to be heard before a Referee.

Final judgment was given in favor of the plaintiffs on the report of the Referee on June 12, 1912, which judgment included the license taxes held to be payable by the defendants for the years 1905 to 1911, inclusive, amounting to the sum of $17,474 for the two companies.

The dispute arises upon the construction of the following subdivision of the statute:

> "That any person or persons, corporation, or company, prosecuting or attempting to prosecute any of the following lines of business within the District of Alaska, shall first apply

> for and obtain a license so to do, from a district court, or a subdivision thereof in said district, and pay for said license, for the respective lines of business and trade as follows, to wit:
>
> Freight and passenger transportation lines, propelled by mechanical power, *registered in the District of Alaska, or not paying license or tax elsewhere,* and river and lake steamers, as well as transportation lines doing business wholly within the District of Alaska, one dollar per ton per annum on net tonnage, custom-house measurement on each vessel. (Italics ours.)

It is admitted that the steamboats now claimed to be subject to the tax under the above statute have the following qualifications of those enumerated in the statute:

(1) They are propelled by mechanical power;

(2) Registered in the District of Alaska;

(3) A few of them are operated wholly within the District of Alaska.

The barges are:

(1) Used in connection with the transportation of freight by the appellant companies;

(2) They are not propelled by mechanical power or any power of their own;

(3) They are registered in the District of Alaska;

(4) Some operate wholly within the district and some are taken to Canada as in the case of the steamboats.

It is contended on behalf of the appellants that the payment of the license tax to Canada exempts such vessels and barges from the payment of another tax to the United States. It is the contention of the respondents that the payment of such tax in Canada does not so exempt the vessels and barges in question.

Assignment of Errors.

I.

The Court erred in deciding (order of Judges Cushman and Overfield of date August 24, 1911), "That the defendant, the Northern Commercial Company, a corporation, is liable to pay to the United States a license tax of one dollar per ton per annum for the years 1905 to 1911, both inclusive, on the net tonnage, customs-house measurement, of each of its freight and passenger steamships registered in the District of Alaska and propelled by mechanical power."

II.

The Court erred in its order of August 24, 1911, by referring the said action to a Referee for an accounting and in compelling the defendants herein to enter into an accounting before said Referee.

III.

The Court erred in its said order of August 24, 1911, in determining that the defendants were liable

to pay any license tax and in not finding in favor of the defendants and dismissing the said action.

IV.

The Court erred in its said order and in its final judgment herein in determining that the defendants were liable, under that part of section 460 of the Code of Criminal Procedure of the District of Alaska set forth in paragraph 2 of the Statement of Facts and Stipulation for Submission without Action.

V.

The Court erred in finding that the word "elsewhere", as used in the section of the statute in controversy, meant places in the United States and not places beyond the United States.

VI.

The Court erred in finding against the contention of the defendants set out in paragraph 8 of said Statement of Facts and Stipulation for Submission without Action, to wit, the defendant contended that it should not be compelled to pay a license of one dollar per ton per annum on the net tonnage, customhouse measurement, on such of its vessels as were operated conjunctively on the waters of the Yukon River within the Territory of Alaska and the waters of the Yukon River within the Yukon Territory of the Dominion of Canada.

VII.

The Court erred in finding against the contention of the defendants set out in paragraph 9 of said Statement of Facts and Stipulation for Submission without Action, to wit, that the defendant should not be required to pay a license of one dollar per ton on any of its river steamboats operated, whether operated wholly on the waters of Alaska or elsewhere.

VIII.

The Court erred in determining that the section of the Alaska Code set forth in said Statement of Facts and Stipulation for Submission without Action was not so ambiguous, indefinite and unintelligible as to render the same ineffective and void, and in construing said section against the defendants.

IX.

The Court erred in its order of August 24, 1911, and in its final judgment herein in determining that the section of said codes last aforesaid was a valid act or law.

X.

The Court erred in its judgment on the report of the Referee of June 5, 1912, in overruling the defendants' objections to said report and defendants' motion to set aside the same.

XI.

The Court erred in its judgment of June 5, 1912, in ordering, adjudging, and decreeing that the said report of the Referee, including the findings of fact and conclusions of law, be in all respects approved and confirmed.

XII.

The Court erred in rendering judgment against the defendants and in approving the report of said Referee in this, that the evidence is contrary to the findings of said Referee and is insufficient to justify the said judgment, in the following particulars, to wit:

a. That the uncontradicted evidence shows that all the steamboats mentioned in the Referee's report, which said report was adopted by the Court as its findings were operated by the defendants on the waters of the Yukon River within the Yukon Territory, as well as on the waters of the Yukon River within the Yukon Territory of the Dominion of Canada, and that each and all of said steamers were required to, and did, pay a license or tax to the Government of the Dominion of Canada, and that therefore the said steamboats were not liable for a license or tax under the laws of the Territory of Alaska or of the United States of America.

b. That the uncontradicted evidence shows that all the steamboats mentioned in the report and findings aforesaid were operated by the defendants

elsewhere than in the Territory of Alaska, and were required to, and did pay a tonnage tax elsewhere than in the Territory of Alaska, to wit, in the Yukon Territory of the Dominion of Canada.

XIII.

The Court erred in adopting the Referee's report herein in this that the same is contrary to the evidence in the particulars set out in Assignment of Error No. XII.

XIV.

The Court erred in adopting finding of fact No. 5 of the Referee, to wit: "That the Northern Commercial Company and the Northern Navigation Company are liable to pay to the United States a license tax of one dollar per ton per annum on the net tonnage, customhouse measurement, of each of its freight and passenger steamers registered in the Territory of Alaska, operated foreign, i. e., on the Yukon River and its tributaries, both in the Territory of Alaska and the Yukon Territory, Dominion of Canada, for the years 1905 to 1911, inclusive," for the reason that the same is contrary to the evidence and to law.

XV.

The Court erred in adopting that part of Section 12 of the Referee's finding No. 6, to wit: "And that the said Northern Commercial Company is liable to pay to the United States as license tax on its said steamers for the years 1905 to 1906,

inclusive, the total sum of $5,090.00," for the reason that the same is contrary to the evidence and to law.

XIV.

The Court erred in adopting that part of section 30 of the Referee's finding No. 7, to wit: "And that the defendant Northern Navigation Company is liable to pay to the United States as license tax on its said steamers operated foreign, for the years 1907 to 1911, inclusive, the total sum of $12,384," for the reason that the same is contrary to the evidence and to law.

XVII.

The Court erred in adopting the Referee's report and in determining by its judgment of June 5, 1912, that the defendants are liable to pay a tonnage tax, or other tax, on the steamers referred to in the Referee's report, or on any steamers operated by them, in this that the said finding is contrary to law, for the reason that the defendants should not be required to pay the license or tonnage tax in question on any of the river steamers operated by them, whether operated wholly on the waters of Alaska or elsewhere, under the statute in controversy, owing to the ambiguity and uncertainty of the provisions of said statute.

XVIII.

The Court erred in adopting the finding of the Referee and in determining by its judgment that

the steamer "Hannah" was liable to pay a tonnage tax for the year 1908, for the reason that the same is contrary to the evidence, for which it appears that the said steamer was put in commission to make but one trip for her sister ship, the steamer "Sarah", which was disabled, and that the license of the steamer "Sarah" should have been transferred to the steamer "Hannah".

XIX.

The Court erred in determining by its judgment of June 5, 1911, that there was due from the defendant Northern Commercial Company the sum of $5,090.00, or any other sum, for license fees on the steamers operated by it.

XX.

The Court erred in determining by its judgment of June 5, 1911, that there was due from the defendant Northern Navigation Company the sum of $12,348.00, or any other sum, for license fees on the steamers operated by it.

XXI.

The Court erred in giving final judgment against the defendants and in refusing to render judgment in favor of the defendants.

XXII.

The Court erred in overruling and denying the defendants' motion for a new trial, and thereby

determining that the evidence was sufficient to justify the judgment and that said judgment was sustained in law.

XXIII.

The Court erred in rendering its said judgment of June 5, 1911, in favor of the plaintiff and against the defendants, for the reason that said judgment is contrary to the evidence; the evidence is insufficient to justify the same; and that said decision and judgment are contrary to law.

XXIV.

The Court erred in rendering judgment against defendants for their costs.

Argument.

Point I.

THIS IS A PENAL STATUTE AND AS SUCH IS TO BE CONSTRUED STRICTLY AND IN FAVOR OF THE TAXPAYER.

The statute under which this controversy arises (Secs. 460, 461, Carter's Code of Criminal Procedure of Alaska) has been held in a recent decision to be penal.

U. S. v. Northwestern Development Co., 203 Fed. 960.

It is a well established principle that penal statutes are to be strictly construed in favor of those

against whom they are to be enforced. Revenue and license tax laws are no exception to this rule.

State v. Wheeler, 44 Pac. 430 (Nev.);
Brown v. Commonwealth, 36 S. E. 485 (Va.);
City of La Crosse v. Gas Co., 130 N. W. 530 (Wis.);
Bluff City Railway Co. v. Clark, 49 So. 177 (Miss.);
Lockwood v. Dis. of Columbia, 24 App. Cas. (D. C.);
U. S. v. Wigglesworth, Fed. Cas. No. 16,690;
Benziger v. U. S., 192 U. S. 38;
Twine Co. v. Worthington, 141 U. S. 468;
Bank of Augusta v. Sandford, 103 Fed. 98;
M'Nally v. Field, 119 Fed. 445;
Lewis' Sutherland on Statutory Constructions, Vol. II, p. 994.

Point II.

IT WAS THE MANIFEST INTENT OF THE LEGISLATURE THAT VESSELS PAYING TAX ELSEWHERE SHOULD NOT BE LIABLE TO THIS TAX.

It is a rule of construction long established that wherever the words of a statute are not conclusive in their meaning, the intent of the Legislature should be ascertained and followed if possible.

Lewis' Sutherland on Statutory Construction (2nd Ed.), § 363.

In this case, as in all cases, there are two guides to be followed in ascertaining this intent:

First, the wording of the statute (which is discussed later on in this brief under Points IV, V and VI) and

Second, the history and circumstances surrounding the passing of the Act and its subsequent amendments.

Lamp Chimney Co. v. Ansonia Brass Co., 91 U. S. 656;

Smith v. Townsend, 148 U. S. 490.

> "It is well settled that where the language of a statute is in any manner ambiguous, or the meaning doubtful, resort may be had to the surrounding circumstances, the history of the times, and the defect or mischief which the statute was intended to remedy. * * *
>
> And by this court in *United States v. Union Pac. R. Co.,* 91 U. S. 72, 79 (23: 224, 228) it was said that 'courts, in construing a statute, may with propriety recur to the history of the times when it was passed, and this is frequently necessary in order to ascertain the reason as well as the meaning of particular provisions in it. *Aldridge v. Williams,* 46 U. S. 3 How. 24 (11: 475); *Preston v. Browder,* 14 U. S. 1 Wheat. 120 (4: 51).' And in *Platt v. Union Pac. R. Co.,* 99 U. S. 48, 64 (25: 424, 429) that 'in endeavoring to ascertain what the Congress of 1862 intended, we must, as far as possible, place ourselves in the light that Congress enjoyed, look at things as they appeared to it, and discover its purpose from the language used in connection with the attending circumstances.''

It is important, first of all, to know just what changes were made by the subsequent amendments to the statutes in order to put it into its present

form. The statute was originally enacted in 1899, and was amended in 1900, only a year after its passage. The amendment was most decidedly a modification of the original Act. In nearly half of the occupations enumerated the tax was reduced.

The subdivision referring to "Freight and Passenger transportation lines" was changed materially. For convenience the two sections are placed side by side:

The Statute as Originally Enacted (1899):	Amendment of 1900:
Freight and passenger transportation lines, propelled by mechanical power on inland waters	Freight and passenger transportation lines, propelled by mechanical power registered in the District of Alaska, or not paying license or tax elsewhere, and river and like steamers, as well as transportation lines doing business while within the District of Alaska
one dollar per ton per annum, etc.	one dollar per ton per annum, etc.

Where the tax was at first levied on *all* lines "on inland waters", it is now on certain described lines—"those registered in the District of Alaska", or those "not paying license or tax elsewhere",—clearly restricting rather than enlarging the scope of the statute. It would have been easy under the statute as originally passed to have insisted on the tax being paid by all vessels "on inland waters" regardless of the fact that they were already paying a tax elsewhere.

Manifestly, then, the Legislature tried to correct this situation, to avoid the possibility of a double tax. This is apparent when we consider that at the time the amendment was passed all of the trading in Alaska not done on coast-wise and ocean-going vessels (omitted from this discussion for the reason that they are specifically taken care of in a later subdivision of the same Act and Amendment) was necessarily with Canada. The Court must take judicial notice of the fact that the only ports on "inland waters" not within the District of Alaska were those of Canada.

Congress very evidently anticipated the probability of a fleet of steamers flying the British flag, registered at and paying a license tax in Dawson, navigating the Yukon River from White Horse to its mouth. It is possible that Congress did more than anticipate the probability, because, as a matter of fact, there was such a fleet flying the British flag, navigating the Yukon River from Dawson to its mouth. Under these circumstances the imposition of a tax on American vessels doing the same business would burden such vessels with a double tax, possibly to the extent of prohibition.

It is possible also that Congress to encourage navigation, decided that it would not attempt to levy a tax on British vessels going into the Territory, but that it would, as far as possible, put American bottoms on a par. The statute is, moreover, so worded that if at any time the license levied in Yukon Territory should be abolished,

American vessels paying a tax in that Territory would, automatically and without amendment, become at once liable to pay the license tax.

Taking these facts into consideration—and they must have been taken into consideration by the Legislature at the time—to impute an intention to the Legislature other than that contended for by the appellants would be to accuse it of an intentional injustice to American shipping.

Point III.

THE SPECIFICATION OF VESSELS "NOT PAYING LICENSE OR TAX ELSEWHERE" AS LIABLE TO TAX UNDER THE STATUTES IMPLIEDLY EXEMPTS VESSELS WHICH DO PAY SUCH A TAX ELSEWHERE.

Further on in this brief we will endeavor to make clear that the omission of the Legislature to make such vessels specifically liable to the tax in the opinion of Professor Gayley, whose analysis of the sentence has been made part of the Transcript of Record (Record, pp. 27-33) has the effect from a grammatical standpoint of exempting such vessels from the license tax in Alaska (Point VI infra).

Aside from that, however, it is apparent that if the Legislature had intended to tax vessels which paid a tax elsewhere also, it could easily have so provided. It has not done so in the words of the statute. It follows from the application of the well known legal maxim *"Expressio unius est exclusio alterius"* that it has impliedly exempted them.

Brown in his "Legal Maxims" is quoted as saying that no maxim of the law is of more general and uniform application; and it is never more applicable than in the construction of statutes 19 *Cyc.* 23.

In

Feldman v. Morrison, 1 Ill. App. 460,

a question arose as to the construction of a statute which prohibited the sale without license of certain liquors which were enumerated.

The Court applied the maxim *expressio unius est exclusio alterius* with the effect that liquors not so enumerated were held to be unaffected by the statute.

For a few of the innumerable cases in which this maxim has been applied see:

Johnson v. S. P. R. R., 117 Fed. 462;
Thomas v. Winne, 122 Fed. 395;
Spier v. Baker, 120 Cal. 370;
People v. Butchers' Assn., 12 Cal. App. 471;
People v. Deutsche etc., 94 N. E. 162 (Ill. 1911);
In re Bailey's Estate, 103 P. 232 (Nev. 1909);
Hughes v. Wallace, 118 S. W. 324 (Ky. 1909).

Point IV.

THE WORD "ELSEWHERE" IN THE PHRASE "OR NOT PAYING LICENSE OR TAX ELSEWHERE" INCLUDES THE DOMINION OF CANADA.

Neither the subdivision of the original Act in question nor its amendment applies to coast-wise

vessels. The words "on inland waters" in the original Act plainly do not include them. The amendment does not do so in terms. Moreover, the facts would not justify the contention, if it were made by the Government, that the later subdivision in both the original Act and the amendment, which provides for this class of vessels specifically, is applicable to the kind of steamers operated by the appellants.

The subdivision of the Act under which this controversy has arisen as amended can only apply to river steamers, and this because of the geographical situation of the Territory of Alaska, of which the Court must take judicial notice. There are no lakes in Alaska navigable by vessels propelled by steam power. The principal river in the Territory arises "elsewhere" than within the geographical boundaries of such territory, namely, the Yukon, which is navigable between White Horse, in Yukon Territory, and St. Michael, Alaska, opposite the mouth of the river.

The Court should also take judicial notice of the fact that Yukon Territory is a subdivision of the Dominion of Canada and has a seat of colonial government at Dawson. Alaska is bounded by no territory except the Dominion of Canada.

It follows as a matter of necessity that the only place where river steamers would probably be called upon to pay a license tax "elsewhere" was and is at Dawson, in the Dominion of Canada.

There is, moreover, no apparent reason why the word "elsewhere" should not be taken in its literal and natural sense in the sentence quoted.

It is defined as:

> "In another place".—*Bouvier's Law Dictionary.*
>
> "In another place; in any other place".—15 *Cyc.* 484.
>
> "In or to another place or places; somewhere or anywhere else".—*Webster's Dictionary.*

The District Court in the case at bar, however, has held that "elsewhere", as used in the above statute, means "elsewhere in the United States". The only justification for inserting the restriction "in the United States" is the doctrine of legal construction known as *"ejusdem generis"*. For example: In a statute forbidding the use of obscene language or profanity "in any street, railroad depot, public place or elsewhere" the word "elsewhere" was held to mean a place of the same kind as those just named—that is, a public place.

Peer v. Dixon, 83 A. 180 (N. J.).

It is to be observed, however, that the decisions wherein the Court has seen fit to adopt the *"ejusdem generis"* construction, they have done so not because of the existence of any legal rule, but because the sense of the statute as a whole is in accord with such construction. When there has not been this reason for it, the Court has without hesitation given the natural meaning to the word.

In the case of

Missouri Lead Mining Co. v. Reinhard, 114 Mo. 218; 21 S. W. 488,

it was held that an English corporation given power in its articles of incorporation to acquire mining lands in the State of Missouri *"or elsewhere"* might acquire such lands in England.

Kansas City Southern Railway Co. v. Wallace, 132 P. 908 (Okla. 1913).

In interpreting the phrase "or other person" the Court says:

> "It is true that, under the doctrine of ejusdem generis, general words, such as those just referred to, for the purpose of ascertaining the intent of the Legislature, are generally restricted in their scope to the specific class of objects named. But, as is said by the Supreme Court of Missouri in the case of State v. Smith, 233 Mo. 242, 135 S. W. 465, 33 L. R. A. (N. S.) 179: 'The rule of ejusdem generis is * * * resorted to merely as an aid in construction. If, upon consideration of the whole law upon the subject, and the purposes sought to be effected, it is apparent that the Legislature intended the general words to go beyond the class specifically designated, the rule does not apply. If the particular words exhaust the class, then the general words must have a meaning beyond the class or be discarded altogether.' Other authorities supporting these general propositions and instructive on this phase of the case may be noted as follows: 2 Lewis' Sutherland, Statutory Construction (2d Ed.), Sec. 436, 437, 438; 36 Cyc. 1119-1122; United States Cement Co. v. Cooper, 172 Ind. 599, 88 N. E. 69; Weiss v. Swift & Co., 36 Pa. Super. Ct. 376; Strange v. Board of Com'rs,

173 Ind. 340, 91 N. E. 242; State v. Brown et al., 163 Mo. App. 30, 145 S. W. 1180; Mears Mining Co. v. Maryland Casualty Co., 162 Mo. App. 178, 144 S. W. 883; State v. Pabst Brewing Co., 128 La. 770, 55 South. 349."

Point V.

PUNCTUATION IS NOT CONTROLLING IN THE CONSTRUCTION OF A STATUTE AND MAY BE DISREGARDED.

The statute is punctuated as follows:

> "Freight and passenger transportation lines, propelled by mechanical power registered in the District of Alaska, or not paying license or tax elsewhere, and river and lake steamers, as well as transportation lines doing business wholly within the District of Alaska, one dollar per ton—etc."

As pointed out by Professor Gayley in his analysis of the above paragraph, the punctuation serves only to increase the ambiguity rather than clarify the sentence. There are at least three errors in punctuation which must be disposed of in order to get at the real meaning of the Act as it was intended to be by the Legislature. They are:

(1) The comma after the word "lines" and not repeated after the word "power" gives rise to the suggestion that it is the "power" which is registered and not the "lines" (Transcript of Record, p. 28).

(2) The comma after the word "Alaska" and before the word "or" is incorrect, whether the con-

junction "or" is interpreted conjunctively or disjunctively.

(3) The comma after the word "steamers" and none after the word "lines", renders it doubtful whether the phrase "doing business wholly within the District of Alaska" modifies "river and lake steamers" or not.

With these examples before us, it is clear that the punctuation of the statute in question should not be resorted to until all other means fail. Nor are we required by law to do otherwise.

> "Punctuation is a minor, and not a controlling element in interpretation, and courts will disregard the punctuation of a statute, or re-punctuate it, if need be, to give effect to what otherwise appears to be its purpose and true meaning."

Railway Company v. Voelker, 129 Fed. 522;
Taylor v. Caribou, 67 Atl. 2 (Me.);
Union Refrigerator Transit Co. v. Lynch, 55 Pac. 639;
Hammock v. Trust Co., 105 U. S. 77; 26 L. Ed. 1111;
Ford v. Land Co., 164 U. S. 662, 41 L. Ed. 590;
Waters-Pierce Oil Co. v. State, 106 S. W. 918 (Tex. 1907);
State v. Brodigan, 125 P. 699 (Nev. 1912);
Duhate v. Adams, 58 So. 475 (Miss. 1912);
Fithian v. St. Louis & S. F. Ry., 188 F. 842 (Ark. 1911);
Lewis' Sutherland on Statutory Construction, Sec. 361.

Applying this principle to the errors pointed out:

(1) The first error is not a matter which is in dispute in this case nor is there any real doubt as to the meaning intended.

(2) The second error is involved in the discussion under Point IV.

(3) As to the third, we can do no better than to quote here Professor Gayley:

> "If there had been no comma after "steamers" the nouns italicized, "river and lake *steamers* as well as *transportation lines*" would by punctuation be modified—both of them—by the adjective phrase "doing business * * * Alaska." As the punctuation stands, the phrase "doing business * * * Alaska" can be interpreted only logically or by implication to modify the "river and lake steamers." Grammatically it does not. Still less can it be taken to modify more remote subjects preceding the adverb "elsewhere" and the additive conjunction "and." In fact, as the statute reads, this punctuation makes all "river and lake steamers" whether "doing business wholly in Alaska" or not a subject of the predicate "shall pay one dollar per ton," etc. And that, I presume, is equivalent to stating that the drafter of the statute unintentionally reduced the law to absurdity." (Transcript of Record, p. 29.)

It is the contention of the appellants that Professor Gayley is right in his interpretation of this punctuation and unless we read the phrase "river and lake steamers as well as transportation lines doing business wholly within the District of Alaska" without the comma after the word "steamers"

the statute is reduced to an absurdity. Under this construction the two subjects of the verb "shall pay" are:

(1) Freight and passenger transportation lines (doing business partly within and partly without the district), and

(2) Transportation lines including river and lake steamers (doing business wholly within the district).

This emphasizes more clearly still that appellants are not liable under this section. It is admitted that the appellants' steamers are "river steamboats" (Transcript, pp. 5-7), but it is by no means certain that they may be called "freight and passenger transportation lines."

Point VI.

ANALYZED GRAMMATICALLY, THE STATUTE EXEMPTS VESSELS "PAYING A LICENSE OR TAX ELSEWHERE."

Analyzing the statute grammatically we find that the following two classes of vessels constitute the subject of the sentence:

1. Freight and passenger transportation lines propelled by mechanical power (a) registered in the District of Alaska, or (b) not paying a license or tax elsewhere.

2. Transportation lines including river and lake steamers, doing business wholly within the District of Alaska.

With the single verb "shall pay" understood as the predicate;

And the phrase "$1.00 per ton per annum on net tonnage, customhouse measurement of each vessel" as the object.

The ambiguity lies in the subject of the sentence as is apparent from the above analysis.

The principle question raised on this appeal arises squarely on the construction of the phrase "or not paying license or tax elsewhere". If that phrase is to be read entirely apart from the phrase immediately preceding it "registered in the District of Alaska", the sentence might be construed as allowing a tax upon vessels registered in Alaska whether paying a tax elsewhere or not. It is submitted that this construction renders the phrase "or not paying license or tax elsewhere" superfluous and unmeaning.

To reduce this to its logical conclusion, the statute could then be read as designating vessels of the following description as liable to the tax:

1. Freight and passenger transportation lines propelled by mechanical power;

(a) registered in the District of Alaska (whether paying a tax elsewhere or not), or

(b) not paying a tax elsewhere (whether registered in the District of Alaska or not).

Under this construction, it would be possible to make ships liable to pay a license tax in Alaska which are

(1) registered in Alaska and paying a license or tax elsewhere; and

(2) not registered in Alaska and not paying a tax elsewhere.

It does not need argument to show that the second of these possibilities at least was never intended by the Legislature. The first is the case at bar and it is claimed that that is more unjust and quite as unintended as the second.

The word "or" in the first clause of the sentence may, according to the opinion of Professor Gayley (Transcript of Record, pp. 31-33), be used in one of three ways:

(a) As a disjunctive;

(b) As co-ordinating the two phrases as equivalent to each other; and

(c) In the sense of "and".

Taking the first of the uses named—"or" as a disjunctive—Professor Gayley is of the opinion that such use makes the two phrases mutually exclusive, and hence, by not inserting that ships paying a license elsewhere could be taxed, the author of the statute has impliedly exempted them by this omission.

> "If, *disjunctive* the 'or' implies an alternative (Whitney, p. 148) between the two clauses; that one may be substituted for the other (Century Dictionary, 'Or', I). The 'or' co-ordinates two clauses, 'each one of which in turn is regarded as excluding consideration of the other'. (Century Dict. 'or' Ia). In that case, grammatically, 'freight and

> passenger * * * lines * * * Alaska' is one subject of the predicate 'shall pay', etc., and 'freight and passenger * * * lines not paying license or tax elsewhere' is a distinct subject 'excluding consideration of the other' (Century), viz., of those whose 'mechanical power is registered in Alaska'. That is to say, whether the author of this language meant so or not, the second clause excludes entirely the question of registration either of 'lines' or of 'mechanical power' only and states that lines paying license or tax elsewhere, are, by implication, not the subject of the predicate 'shall pay one dollar per ton', etc." (Transcript of Record, fol. 28).

This is an application by an eminent grammarian, and from a grammatical point of view, of the legal doctrine which we have already urged in our interpretation of the intent of the Legislature under Point III of this brief *"expressio unius est exclusio alterius"*.

Under the second method of the use of the word "or"—i. e., in a co-ordinate sense—Professor Gayley points out that the two phrases are then to be regarded as equivalent to each other. In other words, they are to be read: "lines registered in Alaska or (as equivalent of the meaning of the former clause) these lines that are not paying license," etc. (Transcript of Record, p. 32).

This again precludes the liability of tax upon ships registered in Alaska and paying a tax elsewhere.

Taking up the third suggestion—that "or" means "and"—it is at once apparent that if the word

"and" were substituted for the word "or" in the clause "registered in the District of Alaska, *or* not paying license or tax elsewhere" all the ambiguity which is now so apparent would be obviated.

The classes of vessels liable to tax under that interpretation would then be:

(1) Freight and passenger transportation lines, propelled by mechanical power registered in the District of Alaska and not paying license or tax elsewhere;

(2) Transportation lines, including river and lake steamers doing business wholly within the District of Alaska.

Such a construction would be unequivocal, equitable, and, it is claimed, expressive of the legislative intent.

That these two words are often substituted one for another as a means of aiding in the construction of a statute is well established by the authorities.

> *Words & Phrases,* Vol. 6, page 5002;
> 29 *Cyc.,* 1505.

The general proposition is well stated in the following extract from *Lewis' Sutherland on Statutory Construction,* which is frequently quoted by the Courts:

> "Sec. 397. USE OF THE WORDS 'OR' AND 'AND'. The popular use of 'or' and 'and' is so loose and so frequently inaccurate that it has infected statutory enactments. While they

> are not treated as interchangeable, and should be followed when their accurate reading does not render the sense dubious, their strict meaning is more readily departed from than that of other words, and one read in place of the other in deference to the meaning of the context. In People v. Rice (138 N. Y. 151, 156, 33 N. E. 846) it is said that the words 'and' and 'or' when used in a statute are convertible as the sense may require. The word 'or' in a statute may have the meaning of 'that is to say', 'to wit', etc."

Cal. Nev. R. R. Co. v. Mecartney, 104 Cal. 616,

the head-note of which reads:

> "In Section 3780 of the Political Code, which provides that a redemption may be made within twelve months from the date of the purchase, *or* at any time prior to the filing of certain affidavits and the application for a deed, the word 'or' may be read 'and', as all the recited events are required to happen before the owner will be deprived of his right to redeem."

The following are some of the innumerable cases wherein the Court has interpreted the word "or" as meaning "and":

Swearingen v. U. S., 161 U. S. 448;
U. S. v. Moore, 104 Fed. 78;
Kennedy v. Haskell, 73 Pac. 913 (Kan.);
Williams v. State, 137 S. W. 927 (Ark.);
Clay v. Central R. R. & Bkg. Co., 10 S. E. 967 (Ga.);
Williams v. U. S., 87 Pac. 647 (Okla.);

Harbor Co. v. Leathem, 45 N. E. 422 (Ill.);
Rocky Mt. Oil Co. v. Bank, 67 P. 153 (Colo.);
Thomas v. City of Grand Junction, 56 P. 665 (Colo.);
Geiger v. Kobilka, 66 P. 423 (Wash.);
Standard Cable Co. v. Atty. Gen., 19 A. 733 (N. J.);
In re Weed, 67 P. 308 (Mont.);
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James v. U. S. F. & G. Co., 117 S. W. 406 (Ky.);
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Point VII.

THE STATUTE DOES NOT APPLY TO BARGES.

It does not appear in the stipulation submitting this question as to barges owned by the appellant companies, whether or not these barges pay any license tax in Canada. If they do, the same arguments apply as in regard to steamboats.

Assuming even that they pay no tax in Canada, the statute in no sense comprehends barges as to the subject of the license tax. Under any construction there are but three kinds of vessels liable to the tax:

(1) Freight and transportation lines propelled by mechanical power;

(2) River and lake steamers, and

(3) Transportation lines doing business wholly within the District of Alaska.

The barges are admittedly not propelled by mechanical power, but are towed and hence are not of the first class, nor can they be said to be river and lake steamers.

By the stipulated facts (Transcript of Record, p. 127) they do not operate wholly within the district and are therefore not within the description of the third class.

Furthermore, this tax is specified to be "$1.00 per ton per annum on net tonnage, customhouse measurement of each vessel." A barge is not a vessel and hence is not within the purview of the Act.

U. S. v. Ohio, Fed. Cas. No. 15,915;
U. S. v. Open Boat, Fed. Cas. No. 15, 967.

Conclusion.

It is the contention of the appellants therefore, that the District Court erred in holding that this statute is applicable to the steamboats and barges owned and operated by them.

By the rule of strict construction of penal statutes any doubt in the mind of the Court as to the meaning of the statute must be resolved in favor of the taxpayer and against the government.

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By the rule of strict construction of penal statutes any doubt in the mind of the Court as to the meaning of the statute must be resolved in favor of the taxpayer and against the government.

In addition to this we contend that it was not the intention of the Legislature in enacting this statute to make it applicable to a case such as is now before the Court,—where the vessels do actually pay a license tax elsewhere and that the word "elsewhere" in this connection includes the Dominion of Canada.

That taken literally and grammatically the statute does not include such vessels.

That it can by no construction include "barges" as a proper subject of the tax.

Finally that to uphold the contention of the government would work an injustice to American ships plying in that district in that it would burden them with the payment of a double tax.

It is therefore respectfully submitted that the judgment of the District Court ought to be reversed.

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No. 2293.

IN THE

UNITED STATES CIRCUIT COURT OF APPEALS

FOR THE NINTH CIRCUIT

NORTHERN COMMERCIAL COMPANY (a Corporation), and NORTHERN NAVIGATION COMPANY (a Corporation),

Plaintiffs in Error and Appellants,

vs.

UNITED STATES OF AMERICA,

Defendant in Error and Appellee.

Upon Writ of Error to, and Appeal from, United States District Court for the District of Alaska, Fourth Judicial Division.

BRIEF OF DEFENDANT IN ERROR AND APPELLEE.

Parts of Appellant's Statement of Facts Controverted.

The statement of facts made by counsel for appellants is hereby controverted in the following particulars:

First: They state on page 1 of their brief that the case comes up on writ of error and appeal upon an agreed statement of facts when in truth it was submitted to the court below upon the agreed statement of facts and the evidence taken at the trial before the court and the hearing before the referee and it comes

up to this court upon the agreed statement of facts and the evidence taken at the trial and hearing.

Pp. 17 to 36 inclusive, and 45 to 66 inclusive, Transcript of Record.

Second: They state on page 2 of their brief that this statute is with reference to the license tax provided for in Section 460, Carter's Code of Criminal Procedure of Alaska, now Section 2569 of the Compiled Laws of Alaska, 1913, when in truth it is under Section 460 of the Code of Criminal Procedure of the District of Alaska as amended by Section 29 of the Political Code of the said District of Alaska, now Section 2569, Compiled Laws of Alaska, 1913.

Par. II, Agreed Statement of Facts, p. 5, Transcript of Record.

Third: They state on page 2 of their brief that final judgment was given in favor of the plaintiffs on the report of the referee on June 12, 1912, when in truth said judgment was so given on June 5, 1912.

Pp. 13, 16, Transcript of Record.

Fourth: On page 3 of their brief counsel for appellants in referring to the steamboats claimed to be subject to the license tax under this statute as having certain qualifications as those enumerated in the statute, omit to state that such steamboats have not and are not now paying such license or tax elsewhere in Alaska.

Pp. 19, 20, Transcript of Record.

Fifth: They state on page 3 of their brief that the barges are not propelled by mechanical power when in truth such barges are propelled and pushed by mechanical power exerted upon them by appellants' steamers operating the barges.

P. 127, Transcript of Record.

ARGUMENT.

I.

(A) As to Appellants' Assignment of Errors.

(1) Counsel for appellants on pages 4 to 11 inclusive of their brief have set out 24 separate assignment of errors but they do not specifically designate what particular error or errors will be urged; furthermore many of these assignment of errors overlap each other and some of them have been waived by appellants.

(2) Appellants' second assignment of errors is waived by their counsel having moved that a referee be appointed by the court to ascertain the amount of tonnage license tax due in the event appellants were held liable to pay the same and said motion was allowed by the court.

Pp. 18, 19, 38 and 41, Transcript of Record.

(3) Appellants have waived their eighth and ninth assignments of errors by having submitted the controversy under said law and having submitted the question of the interpretation and construction of the statute to the court below without having raised the question of the validity of such statute.

(4) Appellants also waived their seventeenth assignment of error when they submitted the controversy under the existing law to the court below.

(5) That assignment of error No. 22 is not entitled to be considered for the reason that the action of the lower court in overruling and denying appellants' motion for a new trial was a matter entirely within the judicial discretion of the lower court and will not be disturbed.

(B) Object of the Statute, Its Validity and Construction.

Congress may provide by direct legislation for a system of licenses for the support of local government in the territories, and the act in question is one for the support of local government, said act, approved June 6, 1900, having superseded a former act of Congress enacted for the same purpose, approved March 3, 1899.

In re Wynn-Johnson, 1 Alaska 630;
United States vs. *Binns,* 1 Alaska 553;
Binns vs. *United States,* 194 U. S. 486, 48 L. Ed. 1087;
Engleman vs. *United States,* 86 Fed. 456;
John J. Sesnon Co. vs. *United States,* 182 Fed. 576;
25 Cyc. 599.

The constitutional inhibition against the laying of tonnage duties by the States does not apply, even though Congress has the right to so legislate for the territories. The tax in question is not one for the

privilege of the arrival and departure of the vessels of appellants to and from the ports of Alaska: it is a license for the privilege of all persons engaged in the same business and the power to require the payment thereof should not be denied, even to the States under the facts appearing in this record.

Giozze vs. *Tiernan,* 148 U. S. 657, 37 L. Ed. 599;
Armour Packing Co. vs. *Lacy,* 200 U. S. 226, 50 L. Ed. 451.

The tax in question is not a tonnage tax or duty but a license fee based on tonnage capacity, the phrases "duty of tonnage" and "tonnage tax or duty" meaning a charge, tax, or duty, on a vessel for the privilege of entering or leaving a port. The authority of the State to assess canal tollage rates on a tonnage basis is upheld even though the vessels were engaged in interstate commerce.

Transportation Co. vs. *Parkersburg,* 107 U. S. 691, 27 L. Ed. 584;
Hughes vs. *Glover,* 119 U. S. 534, 30 L. Ed. 487.

The court doubtless will at an early stage of this hearing be impressed with the anomalous position of the appellants. Here are two corporations whose chief activities are confined to the exploitation of Alaska in mercantile and transportation lines of business. Ever since the year 1905 they have been receiving without cost the benefits for which they should have been paying under this statute. Just why this

cause should have been submitted to the civil courts instead of the criminal branch where it belongs is not for me to question, before your Honors, but I do maintain that appellants come before this court with very poor grace and contest the validity of the statute which makes them criminals unless they shall comply with the terms thereof in advance. There is good law and sound reasoning behind the proposition that the appellants at bar, having been beneficiaries all these years under the very statute in issue and having agreed to submit this statute to the court for its construction, will not at this time be heard to question its validity.

Grand Rapids etc. Railway Co. vs. *Osborne,* 193 U. S. 17, 48 L. Ed. 598;
McKinney vs. *Carroll,* 12 Pet. 66, 9 L. Ed. 1002;
Electrical Co. vs. *Dow,* 166 U. S. 489, 41 L. Ed. 1088;
Daniels vs. *Tearney,* 102 U. S. 415, 26 L. Ed. 187.

In the case at bar, which is a test case upon the outcome of which other cases are awaiting to be disposed of, the government is asking for the payment of the license taxes due from the appellants for the years 1905 to 1911 inclusive, and while, by having the controversy submitted to the court upon an agreed statement of facts and evidence produced at the trial and referee's hearing, appellants have avoided criminal prosecutions and had the use all these years of that money belonging to the government, they now come

into this court and for the first time, as appears under Point I on pages 11 and 12 of their brief, urge upon this court that this is forsooth a penal statute and as such is to be construed strictly and in favor of the tax payer, the appellants, and quote several authorities endeavoring to support their contention, but counsel for appellants quote no authorities where the controversy was brought into court as in this case, upon the motion and agreement of appellants themselves. Appellants are not now being prosecuted for a criminal offense and cannot in this action insist that it be construed strictly and even though they were being prosecuted for a criminal offense, the statute being a revenue statute should be construed liberally and sensibly so as to carry out the purposes of the legislative intention in its enactment, which in this case was to raise revenue, and also so as to avoid an unjust or absurd conclusion.

John J. Sesnon Co. vs. *U. S.,* 182 Fed. 576;
Lau Ow Bew vs. *United States,* 144 U. S. 59, 36 L. Ed. 344.

Replying to the propositions set up by appellants in their argument under Point II, pages 12, 13, 14, 15 and 16 of their brief, we insist that the lower court was right in its construction of the wording of the statute itself and holding the vessels of the appellants to come within the plain scope thereof and this contention is made the more logical from a comparison of Section 460 as originally enacted (pages 121 and 122, Carter's Code of Alaska), and the section as

amended by the Act of June 6, 1900 (Sec. 29, pages 140 and 141, Carter's Code of Alaska, and Sec. 2569, Compiled Laws of Alaska, 1913). The original reading of said Section 460 as applying to license on vessels was as follows:

> "Freight and passenger transportation lines propelled by mechanical power on inland waters, one dollar ($1.00) per ton per annum on net tonnage custom house measurement of each vessel. * * * Ships and Shipping: Ocean and Coastwise vessels doing local business for hire plying in Alaskan waters one dollar ($1.00) per ton per annum on net tonnage custom house measurement of each vessel."

The section as amended referring to the same subject matter is as follows:

> "Freight and passenger transportation lines, *propelled by mechanical power registered in the District of Alaska, or not paying license or tax elsewhere, and river and lake steamers, as well as transportation lines doing business wholly within the District of Alaska,* one dollar ($1.00) per ton per annum on net tonnage custom house measurement on each vessel. * * * Ships and Shipping: Ocean and coastwise vessels doing local business for hire plying in Alaskan waters, *registered in Alaska or not paying license or tax elsewhere,* one dollar ($1.00) per ton per annum on net tonnage, custom house measurement of each vessel."

The italicized matter in the last quotation is the substance of the amendment.

(a) Why was not the phrase "or not paying license or tax elsewhere" carried into the original act of March 3, 1899? We answer: Because at that time Alaska as a whole constituted one judicial division

under the act of May 17, 1884 (23 Statute at Large, page 24), and said act of March 3, 1899.

(b) And why was said phrase inserted in the act of June 6, 1900? We answer: Because under Section 4 of that act there were created three judicial divisions in Alaska where there had formerly been but one and under Section 7 thereof, without the "elsewhere" restriction the clerk of the court in each division where such vessels operated would be authorized to collect said one dollar ($1.00) per ton license which would have been a flagrant example of double taxation for the same purpose in the same jurisdiction.

(c) What was the purpose of the remaining amendatory matter? We answer: Very obviously a reclassification. Under the original act there were but two classes with the following qualifications, to-wit:

I. Freight and passenger transportation lines (1) propelled by mechanical power and (2) plying on inland waters.

II. Ocean and coastwise vessels doing local business for hire plying in Alaskan waters.

Under the amended act there are three classes in lieu of class I above mentioned with the following qualifications:

Class I. Freight and passenger transportation lines propelled by mechanical power (1) registered in the District of Alaska (2) or not paying license or tax elsewhere (in Alaska).

Class II. River and lake steamers.

Class III. Transportation lines doing business wholly within the District of Alaska.

The amendment therefore obviates two legal objections, *first,* double taxation which might have resulted without it, and *second,* lack of uniformity which would have resulted but for class III above enumerated. It is too patent for argument that if Congress in making this amendment had in mind a distinction between vessels operating in interstate and foreign commerce and those operating wholly in Alaska, such distinction could and would have been made in a clear, unambiguous and separate class or proviso; in fact we submit that the addition of class III above mentioned is equivalent to an expressed declaration that vessels registered in Alaska are subject to the payment of the license tax without regard to where they operate outside the waters of Alaska.

(C) What is Meant by the Word "Elsewhere" in this Statute?

Replying to Points III, IV, V and VI of appellants' argument in their brief, we submit to the court the following propositions:

The clause in this statute "or not paying license or tax elsewhere" means elsewhere within the jurisdiction and Canada is not within such jurisdiction, for it is an entirely foreign country.

Judy vs. *Beckwith,* 15 L. R. A. (N. S.) 142;
Sturges vs. *Carter,* 114 U. S. 511, 29 L. Ed. 240;
American Steel and Wire Co. vs. *Speed,* 192 U. S. 500, 48 L. Ed. 538;
Vol. I, Bouvier's Law Dictionary, p. 654;

Vol. III, Words and Phrases, p. 2348;
Brown vs. *Jones et al.,* 4 Fed. Cases 2017, p. 404;
15 Cyc. 481 and notes;
Lau Ow Bew vs. *United States,* 144 U. S. 47, 36 L. Ed. 345;
United States vs. *Billings,* 190 Fed. 359 to 368.

The tonnage license tax on freight and passenger transportation lines propelled by mechanical power registered in the District of Alaska or not paying license or tax "elsewhere" must be paid in the Judicial District of Alaska where operated—if not paid elsewhere in the territory of Alaska—even though a similar tonnage license tax has been paid in some foreign country.

Coe vs. *Errol,* 116 U. S. 517, 29 L. Ed. 717;
Grigsby Construction Co. vs. *Freeman,* 108 La. 435, 58 L. R. A. 349;
Nelson Lumber Co. vs. *Loraine,* 22 Fed. 54;
Southern Pacific Co. vs. *Kentucky,* 222 U. S. 63, 56 L. Ed. 96;
Ayer & L. Tie Co. vs. *Kentucky,* 202 U. S. 409, 50 L. Ed. 1082.

The tax is not double.

Davidson vs. *New Orleans,* 96 U. S. 97, 24 L. Ed. 616;
Tennessee vs. *Wentworth,* 117 U. S. 129, 29 L. Ed. 830;
Savings and Loan Society vs. *Multnomah County, Ore.,* 160 U. S. 421, 42 L. Ed. 803.

As to the construction of the word "elsewhere" employed in Section 460 of the Alaska statute as men-

tioned in issue here (Sec. 2569, Compiled Laws Alaska, 1913), we contend that the lower court was right in adopting the rule of *ejusdem generis* and saying, in effect, it means "a like license elsewhere within the jurisdiction" (of Alaska). Any other construction would render the section meaningless both as to the scope and purpose of the act and the modifying context. We think the refined grammatical technique of Professor Gayley (should this court be inclined to consider the same) must give way to the well settled rules of legal construction. The doctrine of *ejusdem generis* is especially applicable to statutes defining crimes and regulating their punishment. By this rule where general words following the enumeration of particular classes of persons or things, the general words will be construed as applicable only to persons or things of the same general nature or class as those enumerated.

36 Cyc. 1119, Division II and note 36;
Rohlf vs. *Kasmeirer,* 118 N. W. 276, 23 L. R. A. (N. S.) 1286;
Lane vs. *State,* 39 Ohio State 312;
Ex parte Muckenfuss, 107 S. W. 1131;
State vs. *Goodrich,* 54 N. W. 577.
P. 34, Transcript of Record, No. 2293 in this Court.

An ordinance made it a crime to "aid, maintain or "assist in any improper noise, riot or disturbance or "breach of the peace in streets or highways or else- "where in the city" and the Court said the word "elsewhere" should be construed in connection with the

words "streets or highways" and must be regarded as signifying places *ejusdem generis.*

State vs. *Camden* (N. J.), 19 Atl. 539.

So under Minnesota Criminal Code, Sec. 240, Subdivision 2, it was made a crime for any person to entice an unmarried female "into a house of ill fame or of assignation or elsewhere" for purposes of prostitution. The court held the word "elsewhere" to be *ejusdem generis* and referring only to places similar in character to houses of ill fame or of assignation.

State vs. *McCrum,* 36 N. W. 102.

These steamboats and barges are all registered at St. Michael, or Eagle, in Alaska. They have their real *situs* in Alaska for they ply on the rivers in Alaska. They have the protection of the laws of Alaska and Congress can regulate commerce not only between the states but also with foreign states and it certainly has the power and authority to impose a license tax as it has done in this case upon appellants' freight and passenger transportation lines propelled by mechanical power.

As to the *situs* for the purposes of taxation it is not claimed in this case that the steamboats in question have a home port outside of Alaska. The boats are registered either at St. Michael or Eagle and the greater part of their business is done within Alaska.

Johnson vs. *Merchants Line,* 37 L. R. A. 518 and annotations;

Pp. 33, 34, Transcript of Record.

Furthermore there is no claim that said vessels are engaged in interstate commerce or that the corporations owning them have their *situs* in any state or foreign country to which their operation attaches. Therefore the *situs* of said property for the purpose of the license claimed under this statute is Alaska.

36 Cyc. 17;
The Jennie B. Gilkey, 19 Fed. 127;
Morgan vs. *Parham,* 83 U. S. (16 Wall.) 471, 21 L. Ed. 303;
Hays vs. *Pacific Mail S. S. Co.,* 58 U. S. (How.) 597, 15 L. Ed. 254.

Even if the vessels in question were entered in Alaska from a foreign country and their home port was Dawson, Yukon territory, Canada, the contention of appellants would not be sustained because the treaty of 1815, putting British vessels coming into our ports on the same footing as to duties and charges as American vessels, extends only to vessels coming from European ports, and not to vessels coming from the West Indies or the British possessions in North America.

United States vs. *Hathaway* (3 Mason 324), Fed. Case No. 15326;
The Alta, 148 Fed. 663.

The taxing power of the State is never presumed to be relinquished and it exists unless the intention to relinquish it is declared in clear and unambiguous terms admitting of no other reasonable construction. An exemption from taxation must be clearly defined,

and founded upon plain language without doubt or ambiguity. Also exemption from taxation is not favored by law and will not be sustained unless such clearly appears to have been the intent of the legislature and every reasonable doubt should be resolved in favor of the taxing power.

Southwestern Ry. Co. vs. *Wright,* 116 U. S. 231, 29 L. Ed. 626;
Bank of Commerce vs. *Tennessee,* 161 U. S. 134, 40 L. Ed. 645;
Yazoo and Mississippi Valley R. R. Co. vs. *Adams,* 130 U. S. 1, 45 L. Ed. 395;
Chicago, Burlington and Kansas R. R. vs. *Missouri,* 120 U. S. 569, 30 L. Ed. 732;
Memphis Gas Light Co. vs. *Taxing District,* 109 U. S. 398, 27 L. Ed. 976.

Exemptions from taxation are regarded as in derogation of the sovereign authority and of the common right and therefore not to be extended beyond the exact and express requirements of the language used construed *strictissima generis.*

Yazoo and Mississippi Valley Ry. Co. vs. *Thomas,* 132 U. S. 174, 33 L. Ed. 302.

The specific terms of the section in controversy are " Freight and passenger transportation lines propelled " by mechanical power registered in the District of " Alaska," qualified by the general term "or not paying license or tax elsewhere," bearing in mind the organization of the tax collecting power of Alaska under the act of June 6, 1900, there being three judi-

cial divisions, the clerk of court in any one of which might demand the licenses in controversy. It seems to us that the meaning of said section is so plain as to make unnecessary any further argument or reference.

II.

Is This Case Properly Before This Court?

Counsel for the government contend that, although there was a stipulation to submit to the District Court of Alaska the question of the liability of the appellants to pay this license tax, that stipulation made no provision for an appeal or writ of error to this or any other court—in fact the whole tenor of the stipulation indicates that appellants would abide the decision of the lower court in which tribunal or a judge thereof was vested the power to grant licenses—the proceeding was not a suit or action in which a final decree or judgment was rendered, from which the appellants could take an appeal or writ of error to this Court or the Supreme Court. This proceeding was in effect an application for a license, coupled with a protest against being required to take out such a license and pay for the same, on the ground that it did not come within the provisions of the Alaska law and its collection was therefore illegal. Furthermore, in the case at bar we have a revenue statute imposing license taxes for the support of local government in the territory of Alaska but the appellants have not paid any money in liquidation of such license taxes. The statute of limitations, too, has been enlarged by the stipulation

to submit the controversy to the lower court and the jurisdiction of the lower court under the stipulated case would not be affected as judgment in the lower court should be considered final. Therefore the order and judgment of the District Court should be confirmed.

Pacific Steam Whaling Co. vs. *U. S.,* 187 U. S. 452, 47 L. Ed. 253 to 256 inclusive;
Corbus vs. *Alaska Treadwell Co.,* 99 Fed. 334;
Taylor vs. *Secor,* 92 U. S. 613, 23 L. Ed. 673;
Patton vs. *Brady,* 184 U. S. 614, 46 L. Ed. 717;
Pp. 4 to 10, inclusive, and 33, 34, 38 and 39, Transcript of Record.

III.

Does This Statute Apply to Barges?

The barges of the appellants are registered in Alaska, have their *situs* in Alaska, are used on the rivers of Alaska, have the protection of the laws, are propelled by mechanical power by steamers pushing such barges and they are not taxed in any other way nor are they exempted from taxation, for the arguments and authorities against exempting barges from taxation are just as strong as regards the steamboats hereinbefore referred to.

There are some ten propositions concerning these barges to be carefully considered.

(1) While the barges are not propelled by their own mechanical power they are propelled by the mechanical power of the steamboats pushing them and the statute does not say that they must be propelled by

low for the amount named; also that said ruling as to liability to the license tax is applicable to appellants' barges.

This is not a criminal case being prosecuted against appellants and even though it were, the general rule of strict construction of penal statutes does not apply and particularly such rule does not apply in favor of appellants in the case of a revenue statute as this is.

The Congress of the United States exercising plenary powers over the territory of Alaska and endeavoring to raise revenue for the purpose of paying the expenses of local government in Alaska provided by the United States itself, certainly did intend that appellants should pay a license tax upon their vessels and barges registered in Alaska or not paying license or tax elsewhere in Alaska, not elsewhere in Canada entirely outside the jurisdiction even of Congress itself.

The statute should be construed liberally and so as to give it the effect for which it was enacted, for revenue purposes, and according to the well settled rules of legal construction, and by such construction both the steamboats and barges of appellants should be included as proper subjects liable to this license tax since they together constitute appellants' freight and transportation line propelled by mechanical power registered in Alaska.

The upholding by this court of the government's contention as sustained by the District Court would work no injustice whatever to American ships plying in the District of Alaska, but would rather place all on an equitable basis for the reason that those

ships touching at Canadian ports on the Yukon River gain a considerable advantage thereby over those ships confining themselves to Alaskan waters and for that advantage the Canadian government requires the payment of a small sum each year amounting to about one-sixth of what they are required to pay under this statute in Alaska and they should not be allowed to, nor did Congress intend that they should, thus evade this license tax in Alaska. All the authorities, too, hold that such taxes are not double. Canadian ships touching at Alaskan ports also have certain duties or tonnage to pay in addition to the license or tax they pay in Canada. In Alaska, too, Congress has imposed no personal property valuation tax upon appellants' steamboats and barges other than this license tax upon appellants' line of business in prosecuting a freight and transportation line propelled by mechanical power, consisting of its steamboats and barges.

Upon the foregoing arguments and authorities, the government's contention is that the decision and judgment of the District Court was correct and should be affirmed.

Respectfully submitted,

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